A

DISCOURSE

OF THE

Peerage & Juriſdiction

OF THE

LORDS SPIRITUAL

IN

PARLIAMENT.

Proving from the Fundamental Laws of the Land, the Teſtimony of the moſt Renowned Authors, and the Practice of all Ages.

THAT

They have no right in claiming any *Juriſdiction*

IN

Capital Matters.

Give unto Cæſar *the things which are* Cæſars, *and unto* God *the things which are* Gods, Matth. 22. ver. 21.

LONDON,

Printed in the Year M DC LXXIX.

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TO THE
READER.

IN this licentious Age, *and especially at this Juncture of Time, when every impertinent* Scribler, *and seditious* Pamphleter, *hath free access to the* Press, *it may be thought neither Prudent nor Honourable, for a Man of Sober and Serious Thoughts, to come into the* Field *and list himself among the* Unlearned Multitude *of* Writers *that are in these days. That Popular* Applause *which is generally expected from this* Method, *is a thing which I (more ambitious of being publickly useful then publickly known) never designed to purchase at that rate; and therefore is not the* Motive *that induced me to this* Undertaking. *I would have been glad, if any other of greater* Learning *and* Parts, *had done the* World *so much* Favour, *as to have made a* Perfect Disquisition *into this* Matter, *and to have discussed the* Point *according to the* Merits *of the* Cause; *for then I doubt not but the Reasonableness of the* House *of* Commons Dissention *from the* House *of* Lords, *would have appeared to all* Impartial *and* Dis-interested Minds. *As for my own part, I confess that partly through the* Consciousness *of my own* Inability, *and partly through my* Unwillingness *to be concerned in a Thing of this* Weight, *I should never have engaged my self in it, if I judged it not necessary to vindicate those* Persons *that are abused with several* undecent *and* unjust Calumnies, *in a late* Book *intituled,* The Honours of the Lords Spiritual asserted, *&c. together with its* Preface.

To the Reader.

This, together with a Desire of Informing the World *in a Thing which is much talked of, but little understood, prevailed with me to omit nothing which might be Serviceable to my Country, and Conducive to the* Unity *and* Peace *of this* divided Kingdom; *especially when it is to be feared, there are too many such as the* Author *of the above-mentioned* Book, *who under the* specious pretence *of* Loyalty *and* Affection *to the* Church, *do what in them lies to make the* Gap wider, *and* Distemper *more* Incurable. *That I may not seem to* injure him, *you may consider the Design of his* Discourse; *The Persons against whom he directs his* Preface, *are those who withstood the* Pretensions of the Bishops to Jurisdiction in Matters of Blood: *those are no other than that* Honourable Assembly, *those* Champions of the Protestant Religion, and the Liberties of the People of *England*, the House of Commons in the last Parliament. *To Revile the* Representatives *of the* Commons *of* England, *and in them* Virtually *the* Persons themselves *that are* Represented, *with such Scandalous Aspersions, and Opprobrious Reflections;* Being Favourers of the Rebellious Commotions in *Scotland*, Ill-natured, Censorious, Covetous, Self-seekers; *and which is* worse *than all this,* as being of the same Principles with those that threw down Episcopacy, took up Arms against their Native Soveraign, Plundred and Devested His Majesties most faithful Subjects of their Goods, Estates, and Lands, and embrewed their Violent, Wicked, and Rebellious Hands in his most Sacred Blood, *&c. I say, such Scurrilous and Satyrical Language thrown upon the very* Face of Authority, *doth ill-become the* Religion of a Christian, *and the* Honesty of a true English-man. *It is a known* Maxime *among Men of honest and sober Principles, and Lovers of the* English Nation, That Nothing can make us Happy or Miserable, but an Union or Division amongst our Selves: If there be a good Understanding betwixt Prince and People, nothing can make *England* miserable, but if there be Jealousies and Divisions, nothing can make it Happy. *Therefore whoever they are, that by* reciprocal Accusations, *and raising of* mutual Jealousies *of the One's good Will and Affection, and the Others Loyalty, especially in things that are false in themselves, deserve to be look't upon as inveterate Enemies to the* Peace *and* Happiness *of this* Kingdom: *And yet you may observe, that whosoever can give the* Court *the most* Satyrical Language, *expects to be reckoned the most* Zealous Patriot, *&c. And those, forsooth, who can with the greatest* Scurrility, *and the most* reproachful *Epithets, asperse the* House of Commons, *would be thought the most* Loyal Subjects: *But if* Integrity *and* Religion *it self be not quite banished from the* Conversation *of* Mortals, *both these sorts of* People *will fail of their*

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Expectation. *I have read of two great Favourites of* Alexander *the Great*, Hepheſtion *and* Craterus; *one of them*, (*ſaith my* Author) Alexandrum dilexit, *but the other* dilexit Regem: *It may be a Queſtion which of theſe was the better Subject, I ſhall not undertake to determine it, but ſhall leave it with an Obſervation of that Noble and truly Loyal* Courtier *Sir* Thomas Coventry, *Lord Keeper of the* Great Seal *to His late Majeſty, in a Caſe of the like nature:* Some (*ſaid he to the Houſe of Lords*) would have the Kings Prerogative rather Tall than Great, others *e contra*; ſome do love the King, rather than *Charles Stuart*; *others* e contra: (*but what his* Sentiments *were of* thoſe Matters, *you muſt gather from what he ſaid a little after*) None can be truly Loyal, but he that is a good Patriot; and none can be a good Patriot, but he that is truly Loyal. *The Intereſt of the King and People are ſo interwoven and linked together, that none can be truly ſaid to be a Lover of* One, *but he muſt be a Lover of* Both.

But, to return to our Author, *I Proteſt I have peruſed the* whole Volume *with the greateſt* Impartiality *that can be; and except his* Sawcineſs *and* Ill-nature *againſt the* Houſe of Commons, *and* Gentlemen of the Long Robe, *I find nothing in the whole Book that deſerves any* Animadverſion: *It is evident from his* Method of Arguing, *and the* Medium's *he maketh uſe of to prove his* Aſſertion, *that he is altogether a Stranger to the very State of the* Controverſie; *and that notwithſtanding his Confidence in Aſſerting, his Book diſcovers more* Ignorance, *than his Preface doth* Petulancy: *And it is no wonder, for* Ignorance *and* Impudence *are generally Concomitant: And this is all that I think fit to ſay in Anſwer to him. The Reaſon why I ſubjoyn the following* Diſcourſe, *is, becauſe although I cannot perſwade my ſelf that he deſerves a* Refutation, *yet that* Truth *which he labours to darken with an* Impertinent Harangue, *deſerves to be* cleared *and* demonſtrated: *If any ſhall go about to* Attacque *this* Diſcourſe *with* Drollery, *or* Satyrical Invectives, *I decleare before-hand, I do not reckon my ſelf obliged to* Reply; *I do not think it a* Reputation *for* Men of Senſe *to Combate at theſe Weapons; But if Occaſion be, I ſhall ſend his* Anſwer *to the* Dung-Carts, *or* Oyſter-Boats, *from whence I doubt not, but he ſhall receive due* Correction *for his* Folly *and* Impudence; *but if he Aſſault it with* Reaſon *and* Sobriety, *he ſhall find a Defence agreeable. I muſt confeſs I am heartily ſorry at the Occaſion of this* Diſpute, *it hath unhappily fallen out at that Moment of Time, when above*

all

all things it was necessary for the Church *and* State *to* Confederate, *and joyn Hand in Hand, to the* Ruine *and* Confusion *of the* Common Enemy, *and the Extirpation of that* Poysonous Plant, *whose growth will quickly become fatal to both: but however, as it is hard on the one side, that any should be compelled to lay down that which they suppose is their* Right; *so on the other side, it is a thing unreasonable and of dangerous Consequence, to admit of any Innovation, though it were in a Matter of far less Moment than this is: so that there is great Reason for both sides to insist upon it. If this* Enterprise *of mine be so successful, as to convince those that are in the mistake, then I compass my End, and am Satisfied; which that it may do, I refer you to the Consideration of the following* Discourse.

Farewell.

A DISCOURSE OF THE Peerage and Jurisdiction of the *Lords Spiritual.*

AS the granting of large Immunities, Priviledges, and Possessions to the Church, doth well become the Piety and Religion of a Christian Prince, or any other Supream Power; And as the robbing of the Church of any of its Just Rights, lawfully granted, is Sacriledge of the Highest Nature: So it is the Duty of all the Sons of the Church, upon all Occasions, thankfully to acknowledge the Bounty and Munificence of their Pious Benefactors, and to forbear all unjust Claims and ambitious Pretensions to things which were never granted: A failure in this is almost as great an Immorality (considering the Quality and Profession of the Offenders) as the former. And it is doubtless not onely lawful, but commendable, for the persons whose Right and Property is invaded in either case, to defend themselves with all their power against the Invaders; otherwise we must condemn our Ancestors, who defended the Kings Prerogative, and the Subjects Right, when it was encroached upon by Procurers of Citations and Process of Provisions and Reservations of Benefices, Dispensations for Pluralities, *&c.* from the *Court of Rome*; and withstood those unreasonable Demands of Absolute Exemption from Secular Power made by the Clergy; and several other things about Marriages, Legitimation, *&c.* which they claimed by vertue of several Decretals of their Popes and Councils: I confess if there were either Statute-Law or Common-Law for the *Bishops* Voting in Capital Cases, I would be very far from arguing against it, for that were to call in question their undoubted Right. But if there be any reason to make me believe they have no Right at all in that case, I hope it will be excusable in me to make an Impartial Enquiry into the Thing.

If the *Spiritual Lords* have any right of Judicature in Capital Cases, it must be either *Jure Divino*, or *Jure Humano*; if the former, it must be proved out of the *New Testament*, for there is no consequence from the Authority and Jurisdiction of the *High Priest* under the Law to the Authority of *Bishops* under the Gospel, and that is the most generally received Opinion among the Protestant Divines, those at least who have listed themselves under the Banner of the *Protestant Religion*, in its defence against the exorbitant power and usurpation of the *Bishop of Rome*, who makes use of the same Argument for the Authority of his Holiness *in Cathedra*: Because whatsoever is alledged out of the *Old Testament*, is either part of the Mosaical method of administring Justice, proper onely to the Judaical Oeconomy; or else belonging to the Temporal Constitution of the Kingdom of *Israel* and *Judah*, which are no more binding to us, than those Laws of theirs whereby each man recovered his right and property: or than the Laws of the *Syrians*, or any other Nation were binding to the *Jews*.

Those Instances that are given of so great trust reposed in, and Honours conferred upon, Spiritual persons by *Christian Princes*, after the first three Centuries, can prove no more, but that so was the Constitution of the Government of those Kingdoms; and it doth not follow that therefore it must be so in all other Kingdoms: for which cause it is evident, that the first Four Chapters of the Gentlemans Book, are altogether impertinent.

If the *Spiritual Lords* ground not their Claim upon *Divine Right*, then if they have any at all, it must be by *Humane Institution*: My business is not to examine whether such an Institution were good and reasonable, or not? That I leave to the

Consideration of the Parliament, in whose Determination every true Subject ought heartily to acquiesse: but all that I have to do, is to examine whether or no there be such an Institution, and that is the point which I intend to insist upon.

No Humane Institution can do their Lordships any kindness in this, except the Laws of *England*, and those are of two sorts, either Statute-Law, or Common-Law: The former is not pretended to; the onely question is about the latter: for that same Law which gives them power to sit in the House of Lords in any case, gives them power also to sit in Capital Cases, if they have any such power; and that they have no such power by the Common Law of *England*, is the *Probandum*.

Those in whose power Originally it was at the first reduction of this Nation under Rules of Government to Invest Religious Persons with *Honours*, *Jurisdictions* and *Priviledges*; might by the same power have made them greater or lesser than they did; and consequently might at the first Institution have limited the same *Jurisdiction*, &c. to such and such matters as they themselves thought fit to intrust them with, and not to others. If those persons that first conferred upon some of our Clergy-men that *Jurisdiction* which they now enjoy of Voting in the *High Court of Parliament*, had given it indefinitely in all Matters, and over all Causes, and they had exercised their Jurisdiction accordingly from time to time, then their right had been indubitable; but if this limitation had been made, that their *Jurisdiction* shall extend to all Causes, except such as are Capital, and they never exercised any *Jurisdiction* in such; then there cannot be any colour or ground of Claim. Now the *Common Law* is a general Custom or Usage in this Realm in all Ages practised and allowed beyond the memory of man; and because there is no Record, nor any other undeniable Evidence of its commencement, it is therefore presumed to have been a Law ever since there hath been any Government in this Nation: Seeing therefore that the *Jurisdiction* of the *Bishops* in *Parliament*, is supposed to be as ancient as the Government it self; If it can be proved that by the Common Law (*i.e.*) the continued practice of all Ages, the Transactions whereof are Recorded, the Clergy never did exercise *Jurisdiction* in Cases of Blood; then inasmuch as no Record maketh appear what time this Custom did begin, we must of necessity presume that their not Voting in Capital Cases, is as ancient as their Voting in any Case; and consequently that those who first conferred upon them their *Jurisdiction* in *Parliament*, gave it with this limitation, that it should not extend to Capital Cases.

This being premised, I shall proceed to prove that by the Common Law of *England*, (if not by an *Act of Parliament*) the *Lords Spiritual* have no right to Vote in Capital Cases: That will be done if I demonstrate these two things;

1. That their Voting in Capital Cases is contrary to the intent and meaning of *Magna Charta*.
2. That it is contrary to the known practice of all Ages until this day.

The first I shall prove from the Reason and Nature of the thing, and from Precedents.

By the 29th of *Magna Charta* it is ordained, that, *Nullus liber homo capiatur vel imprisonetur, &c. aut ut. lagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus nisi per legale judicium parium suorum, &c.* And accordingly the Precept of the Lord High Steward to a Serjeant at Arms, is to summon, *Tot & tales Dominos Magnates, & proceres hujus Regni Angliæ prædicti R. Comitis pares, &c. Co. 3. Inst. 28.* Whence it is evident that every Judge must be a *Peer* (*par*) to the Prisoner; and I do think it a very easie matter to prove that no *Spiritual Lord* as such, is Invested with that *Parity* which is requisite within the intent of *Magna Charta*, to constitute him a sufficient Judge upon the life and death of a Temporal Lord: Before I enter upon the proof of this, it will be necessary to say something of the Nature of their Peerage.

Their Peerage doth accrue either by the Investiture of their Bishopricks, *ipso facto*, or by their Summons to Parliament; it is agreed by all Authors of greatest Authority, that they are Parliamentary Lords immediately by their Investiture and Induction into the Temporalities, which are held of the King *per Baroniam*, and are therefore

fore Lords of Parliament only *ratione tenuræ*; ſo is *Coke*, *Stamford*, *Selden*, and others: But they are not intituled to any more Honour or Juriſdiction by their Writs, for theſe two Reaſons: 1. Becauſe a *Summons* to Parliament cannot of its ſelf create a Baron, for then all the Kings Judges, Serjeants and Councel had been ennobled in divers Parliaments in the time of *Edw.* 1. in all of *Edw.* 2. and moſt of *Edw.* 3. for they had then the ſelf-ſame Writ that Earls and Barons had, yea and the Kings two Eſcheators had the ſame Writ, *Anno* 12. and 14 of *Edw.* 2. The firſt Summons extant upon Record is that of 49 *H.* 3. which is one joynt Summons to all the Lords and Judges; and is the ſame in ſubſtance with the Writ of Summons at this day, which is given to the Lords, and differs onely in matter of Form, *Anno* 23 *Edw.* 1. *Jun.* 23. The Writs are ſeveral, the only difference is in the Style, and the words following, (*viz.*) *Super arduis negotiis quibuſdam nos & Regnum noſtrum & vos cæteroſque Prelatos & eodem Regno tangentibus, &c.* To the Biſhops and other Clergy. To the Temporal Lords after the ſtyle the Writ runs, *Nos, &c. & vos cæteroſque proceres & magnates, &c. tangentibus, &c.* To the Judges it was, *Vos cæteroſque de conſilio noſtro, &c. tangentibus.* But in all theſe, the *Mandamus*, which is the moſt eſſential part of the Writ, is the very ſame; *viz. Vobis Mandamus ut, &c. perſonaliter inter ſitis ſuper dictis negotiis cum Rege & cæteris magnatibus & proceribus, &c. tractaturi, veſtrumque conſilium impenſuri*, &c. The ſame is the 27 of *Ed.* 1. and almoſt in all the time of *Edw.* 2. and from the 20th to the 49th year of *Edw.* 3. That which I infer from this, is, that either a Writ of its ſelf without the performance of other Ceremonies, as *Inveſtiture of Robes*, &c. cannot make a man Noble; or elſe the Judges in thoſe Four Kings Reigns having the ſame *Mandamus* in their Writs which the Earls and Barons had *verbatim*, and the ſame in ſubſtance with the *Mandamus* to Peers at this day, were all ennobled.

And further, There doth frequently occur in ancient Records and Writings a difference between *Barones majores*, and *Barones minores*; the firſt are called ſometimes *Barons*, and the other *Barons Peers*. That they both received their Writs and ſate in Parliament, is undeniable: The Nobility of the firſt was without doubt inheritable, but ſo was not the laſt, but were called *Barons Peers*, becauſe of the *parity* of their Revenue. Thus ſaith the *Modus tenendi Parliamentum*, (alwayes allowed for Authentick before Mr. *Prynne*) *ſummoneri & venire debent omnes & ſingulis* Comites Barones *& eorum* pares *ſcilicet illi qui habent terras ad valentiam unius* Comitatus *integri*, viz. *Viginti feodi, &c. vel ad valentiam unius* Baroniæ, &c. *& nulli* minores *Laici ſummoneri debent, ſed ſi eorum præſentia neceſſaria vel utilis fuerit Rex ſolebat talibus brevia mittere.* So that theſe *Baronum pares*, or *Barones minores*, becauſe of the Parity of their Revenue, were called or omitted *ad libitum*, though the *majores* ought to be ſummoned *de jure*; which proves a Writ of Summons to Parliament, doth not ennoble the Party, otherwiſe this Difference muſt fall to the ground. The Roll of 18 *Ed.* 3. *N.* 35. Is that the Cauſe of Summons was declared in the preſence of the King and divers Lords there named, *& autres Barones, & Bannerettes. Chevaliers de Comites, Citizens & Burgeis, &c.* So 46 of *Ed.* 3. *N.* 7. the Roll is, *Dukes, Earls, Barons and Bannerets*: And in many of the Parliament Rolls of *Ed.* 3. it occurs by the *Prelates, Earls, Barons, and other Grandees*; by which it is evident, that anciently there ſate in the Houſe of Lords ſometimes ſome that were under the Degree of a Baron, and they could not be Lords by Inheritance, becauſe a *Barony* is the loweſt Degree of Inheritable Nobility; but they could not be there preſent without their Writs; It doth therefore follow, that a Writ, together with an Appearance in obedience to it, doth not Ennoble the Party. *Note*, That anciently the King by his Letters could have diſcharged any Banneret from ſerving in the Lower Houſe; becauſe, if he pleaſed, he might upon occaſions have ſummoned him to ſerve in the Houſe of Lords; and that is apparent from a Record in the 7th of *Rich.* 2. *R.* 42. *dorſo.* Sir *Tho. Camoys* was choſen one of the Knights of the Shire for *Surrey*, and his Father and Grandfather had been ſummoned to ſeveral Parliaments before: the King diſcharged this Gentleman from ſerving in the Houſe of Commons, becauſe *Ipſe* (ſaith the Record) *& quam plures Anteceſſores ſui* Bannereti *fuerint*:

Nos

Nos animadvertentes quod hujuſmodi Banneretti *ante hæc tempora in* Milites Comitatus *eligi minime conſueverunt, &c.* If this *Camoys* had been reputed a *Baron*, the Country would never have choſe him; and if he had been really a *Baron*, the King would never have diſcharged him becauſe he was a *Banneret*, but becauſe he was a *Baron*.

Another Reaſon for this may be gathered out of the Patent of *John Beauchamp* of *Holt*, the words of which are theſe: —*Sciatis quod pro bono & gratuito ſervitio, quæ dilectus & fidelis Miles noſter* Johannes *de* Beauchamp, *de* Holt, *ſeneſchallus hoſpitii noſtri, nobis impendit, ac loco per ipſum tempore coronationis noſtræ hucuſque impenſis, & quem pro nobis tenere poterit in futurum in noſtris conſiliis & parliamentis, nec non, &c. ipſum* Johannem *in unum* Parium & Baronum *Regni noſtri Angliæ præfecimus, volentes quod idem* Johannes *& hæredes maſculi de corpore ſuo exeuntes ſtatum* Baronis *obtineant, ac Domini de* Beauchamp & Barones *de* Kiderminſter *nuncupentur, in cujus, &c. T. Rege apud* Wodeſtock, 10. *Oct.* It is probable that he was created *Baron* before he received this Patent, becauſe the Patent wants the words of Creation; *Ipſum Johannem præfecimus*: but it is not ſaid, *per præſentes præficimus*; and therefore the Patent running in the *preterperfect tenſe* could have no other operation but only to Record a thing which was paſt: but he was not Created by Writ before the Patent, becauſe it is dated *Oct.* 10. and he received no Writ till the *Decem.* following: Wherefore ſeeing that undoubtedly he was a Baron before he received either Patent or Writ; for the Patent, which is Matter of Record, ſaith, *Ipſum præfecimus*; it follows, that before this time a Baron hath been created without a Writ, which could be no otherwiſe then by the performance of a Ceremony, as *Inveſtiture of Robes*, &c. and this Patent was only an entring of the Creation, *being a tranſitory thing* upon Record.

2. Admitting that *Barons* have been created by Writs; yet *Prelates* are not created *Barons* by their Writs, becauſe there is a difference between a Writ ſent to a perſon that hath no right *ex debito juſtitiæ* to demand it; and a Writ ſent to one that was a Lord of Parliament before, and ought *de jure* to have been ſummoned. The former, together with the perſons obedience, may perhaps make him a Baron: but the latter *I conceive* doth not make any addition to, or enlargement of, their precedent Honour, but only ſummons them to exerciſe their Juriſdiction, and put that power, which they have in execution, and that is only *reducere potentiam in actum*, otherwiſe every Lord would be newly created at every Parliament; every one to whom the Honour is entailed, would have a Fee-ſimple, for a Writ will make a man a Peer in Fee without the word (Heirs) and every Lord Biſhop, L. Keeper, L. Treaſurer, L. Privy Seal, would be as ſuch Inheritable Peers, or at leaſt for life, which are both falſe; for after Regradation their Peerage is ended: Wherefore it being certain that all the Lords both Spiritual and Temporal ought to be ſummoned to every Parliament, the Summons muſt of neceſſity have reſpect to that *Right* which doth entitle them to demand them.

The Inference which I draw from all this, is, That the Lords Spiritual having no Peerage upon the account of their Writs, cannot claim any at all, except it be *Jure Epiſcopatus*, (that is) *ratione terrarum quas tenent per Baroniam*. So that now I come to the next point; *viz.* Whether ſuch whoſe Peerage is *ratione tenure*, and dies either with the determinarion of his Eſtate in the Land, or the diſſolution of the Tenure, be a competent Judge of one whoſe blood is ennobled in caſe of life and death, within the meaning and intent of *Magna Charta*, which enacts that every one ſhall be tryed *per legale judicium parium ſuorum*. The *Negative* I hope effectually to prove from theſe following Reaſons:

1. Every ones *Peerage* ought to be meaſured and proportioned according to the limits and extent of that *ratione cujus* he is a *Peer*; he that is a *Peer*, not only upon the account of his Poſſeſſions, but alſo upon the account of the quality and nobility of his Blood, hath a right of Judicature and Legiſlation both in thoſe things that regulate Mens Eſtates and Properties, and alſo in thoſe things that concern Life and Death; buthe that hath no *Peerage* but what is *prædial* or *feudal*, and not *perſonal*,

ſonal a *Peerage* accruing by vertue of his Tenure and Poſſeſſions, and not the Nobility of his Blood, can have no Juriſdiction but ſuch as is agreeable to the nature of his Peerage; that is, ſuch as ſhall extend to matters of Property and Poſſeſſion, but not to matters of Blood; for as to this he is no more a Peer (*i.e. Par*) to a Temporal Lord, than any private Gentleman, and therefore hath no more Juriſdiction; for it is Parity that makes a man capable of Juriſdiction within the Statute: This is confirmed by the Authority of that Learned Antiquary, Mr. *John Selden*, in the firſt Edition of his *Titles of Honour*, a Volume in *Quarto*, 347, (which I the rather cite, becauſe it was Printed in King *James* his time, and therefore not liable to exception) his words are theſe; *A Biſhop ſhall not be tried by* Peers *in Capital Crimes, becauſe theſe are perſonal, and his being a* Baron, *is* Ratione Tenuræ, *and not of perſonal Nobility.* So it is in Br. Abr. Tit. Enqueſt 99. *Although in an Action for Land, &c. a Biſhop ſhall have Knights in his Jury, as other Lords, yet when he is tryed for his life* (it's ſaid) *he ſhall not have Knights in his Jury.* By Which Book it is evident, that a Biſhop is a *Peer* not in reſpect of his Perſon, but of his Poſſeſſions.

2. The whole Statute of *Magna Charta* is a Grant or rather a Confirmation of the Priviledges and Liberties of the Subjects of *England*; and it is to be ſuppoſed that the enjoyment of every of thoſe Priviledges that are there granted, is a great advantage and happineſs to the Subject: but wherein the advantage of a mans being tryed *per Pares* doth lie, is a Point worth the Conſideration: I conceive it to be this, When thoſe are to be Judges, who may be under the ſame Circumſtances with the Priſoner, and when by their Judgment the Priſoner can loſe nothing but what his Judges, if they be under his Circumſtances may loſe alſo; he may expect that they will not give Judgment but upon Mature Deliberation, and that the Conſideration that it may be their own caſe will deter them from giving a raſh judgment againſt a man that is innocent, or not apparently guilty: Whereas if a mans Life and Fortune, his Honour, the Inheritable Quality of his Blood, his Name and Reputation, and whatſoever may be comfortable in this World, were diſpoſable at the will and pleaſure of inferiour perſons, who have not every of theſe themſelves, and conſequently know not the true value and worth of them, nor the importance of the matter that is judicially before them; it may be preſumed that they will not be ſo careful and concerned in the Cauſe; and it is to be feared they will be too ready to give an inconſiderate and raſh judgment. This I take to be the onely benefit of a mans being tryed by his Peers, which is very ſignificantly expreſſed in the Statute *De Proditoribus*, 25 *Ed.* 3. *cap.* 2. in theſe words; *Et de ceo ſoit provablement attaint de overt fait per gents de lour condition*, &c. But to apply this to our preſent deſign, let us conſider what a Temporal Lord loſeth by an Attainder; In the firſt place he loſeth his Life, his Eſtate real and perſonal: If that were all, a Gentleman might be his Peer; but there is ſomething more, he forfeits his Nobility, which is irrecoverable, being quite extinguiſhed; the inheritable quality of his Blood is thereby corrupted, the Houſe of Lords themſelves ſuffer with him, for they loſe a Member for ever: But a Biſhop forfeits nothing but what he hath in his Natural Capacity, and if he be conſidered as ſuch, he is no Peer; if he be conſidered as a Biſhop, *i.e.* As holding Lands of ſuch a Value in the Right of his Biſhoprick of the King, he is a Peer, but his Peerage is in no danger through his Attainder; the ſucceſſion (which he is ſuppoſed to be as tender of as a Natural perſon is of his Poſterity) is not thereby tainted; for his Peerage, together with all his Poſterity and Land, *Ratione cujus* he is a Peer, go to the Succeſſor without any reſtauration; (ſee *Stamford* 187. 6.) and ſo the Houſe of Lords loſe never a Member: How then can Biſhops, having no Nobility which they can loſe, and conſequently not being *Gents de lour condition*, be fit Judges upon the Life and Death of Noble-men? And upon what grounds can more Juſtice be expected from ſuch than from honeſt ſubſtantial Freeholders?

If this do not pleaſe, let any of the moſt violent Maintainers of this pretended Temporally-ſpiritual Juriſdiction give a rational account, wherein the advantage of a mans being tryed by his *Peers*, doth conſiſt; and let him make appear that the Lords Temporal are any Sharers of this Priviledge when they are tryed by *Biſhops*, and I am ſatiſ-

ſatisfied; but till then, he muſt give me leave to conclude, that this Juriſdiction which is pretended to, is an abuſe of the Satute of *Magna Charta*, and therefore a violence offered to the Liberties of the Subjects of *England*.

3. The Biſhops are not *Peers* in that ſenſe the Queſtion is above ſtated in, becauſe they ſhall not themſelves be tryed by *Peers* in *Parliament*: If their *Parity* be not ſufficient to Entitle them to demand a Tryal by Temporal Lords, then they cannot be Peers, ſo as to be Judges upon the Tryal of Temporal Lords: but if they be really *Peers* to all intents and purpoſes, then we charge all our Anceſtors with a groſs Violation of the Subjects Priviledges granted by *Magna Charta*; for every Biſhop is *Liber homo*, a Subject of this Realm, and ought of Right to have the benefit of a Subjects Priviledge of being tryed by his Peers: But ſeeing by the conſtant practiſe in former Ages, even in thoſe times when the Tyranny of ambitious Prelates, and the Inſolence of Popiſh Uſurpers, did ſwell to ſo great a height; when the poor credulous affrighted Laity, were glad for fear of being delivered Priſoners *In manus & cuſtodiam Diaboli*, and ſecluded from the Society and Converſation of Mankind, to truckle at the Feet of the domineering Clergy, and condeſcend to almoſt all their Demands, however unreaſonable or unjuſt they were; inſomuch, that Innovations in favour of them were eaſily allowed, and new acquiſitions of Honour and Power eaſily obtained. I ſay, if in thoſe times the Honour of being Tryed by Peers hath been denied to them, it may well be inferred that they had no Right; for if it were a thing which they had any colour of pretenſion to, is it reaſonable to ſuppoſe that they quietly without reluctancy would reſign it? when we have Records and Hiſtories full of their Clamours for breach of *Magna Charta*, of their Contentions with their Liege Lord and Sovereign in things that were againſt the known and eſtabliſhed Laws of the Kingdom, tending to the diminution of the Kings Prerogative, the hindring of the Execution of Juſtice upon Malefactors, and the diſpoſſeſſing and injurious Expulſion of the Subject from his juſt and hereditary Right, where they had no reaſon in the world for it, onely that they were inflamed with indignation, that the Native Courage and inbred Generoſity of Mind that was in our Anceſtors, not induring themſelves to be trod upon, nor their Necks to be laid under a Yoke of Tyranny and Uſurpation; did obſtruct the unſufferable growth of that Power and Dominion which their own Pride and Ambition, together with the example and ſucceſs of their Brethren in other Countries, had ſpurr'd them on to. Theſe things are well enough known to all people, whoſe Eyes are opened, and therefore I ſhall not inſiſt upon them; but ſhall prove that Biſhops ought not to be tryed by Temporal Lords: and for that I have the Suffrage of all Learned men, My Lord *Coke* in the Third Inſtitutes, Fol. 30. is expreſs in the Point, *Spiritual Lords ſhall not be tryed by Peers*. *Stamford* in his Pleas of the Crown, *Lib.* 3. *cap.* 1. *De Trial per les Peers*, ſaith, That the Statute of *Magna Charta*, and 20 *H.* 6. *cap.* 9. Which gives Dutcheſſes, Counteſſes, and Baronneſſes the ſame Priviledge that their Husbands have; *Nad eſte miſe in ure de extender a un Eveſque ou Abbe coment que ils injoient le noſme des Seignior de Parlement, car ils nont cel noſme d' Eveſque ou Abbe ratione Nobilitatis ſed ratione officii ne ont lieu in Parlement in reſpect de lour Nobilitie, ejus in reſpect de lour poſſeſſion, &c. l'auncient Baronies annexes a lour Dignities & accordant a ceo il yad divers Preſidents dont l'un ſuit in temps le Roy H.* 8. *&c.* Of the ſame Opinion, and for the ſame Reaſon is *Selden*, *ubi ſupra*; We find the ſame agreed by Juſtice *Dodderidge*, *pag.* 59, 112. and *Elſynge* in his *ancient Method of holding Parliaments*, *pag.* 41. And the Book which I above cited, *Br. Tit. Enqueſt* 99. 27 *H.* 8. in the Biſhop of *Rocheſter*'s Caſe, it is reſolved, That when a *Biſhop* is to be tryed for Treaſon, it is not neceſſary that he have Knights in his Jury, although he ſhall have that Priviledge in a Tryal for his Land; which proves that his Peerage is more for the Priviledge of the Lands and Poſſeſſions of the Biſhoprick, then the Perſon of the Biſhop: as you may further ſee if you compare this Book with *Plowd.* 117. *Br. Tit. Tryal* 142. and *Fitz. Cor.* 115. And I dare affirm there is not any one Lawyer or Antiquary of Note that diſagrees from this: But before I go from this, I ſhall ſtrengthen theſe Authorities by Precedents.

I ſhall

I ſhall begin with *Adam de Orleton*, or *Tarleton* Biſhop of *Hereford*, who in the 17 of *Ed.* 2. was accuſed while he was ſitting in Parliament, of Conſpiring with *Roger Mortimer* Earl of *March*, and aiding him with Horſe and Arms in open Rebellion; whereupon he was ordered to the Barr of the Houſe of Lords; he made no Anſwer to thoſe Crimes that were laid to his charge, only that he was *Suffragan* to the *Archbiſhop* of *Canterbury*, who was his direct Judge under the *Pope*, and without his leave and the conſent of his Fellow-Biſhops he would not anſwer: Now although the Statute of *Articuli Cleri* reſtraining the benefit of Clergy to *Felony*, was made but eight years before this, yet the reſt of the Clergy in that diſorderly time (obſerve the Humility, Obedience, and Loyalty of our Spiritual Fathers in thoſe days) had the impudence in the preſence of the King, to pull him violently from the Barr and deliver him to the Archbiſhop: The King was enraged at this Inſolence, and gave ſpecial Order to apprehend him again, which was done, and was arraigned upon an Indictment at the *Kings-Bench-Bar*, and upon the Queſtion, *How he will be tryed*? He ſaid, *Quod ipſe eſt Epiſcopus Herefordenſis ad voluntatem Dei & Summi Pontificis, & quod materia prædict' Articulor' ſibi impoſit.' adeo ardua eſt quod ipſe non debet in Curia hac ſuper prædictis Articul' impoſit' reſpondere nec inde reſpondere poteſt abſque offenſu Divino & Sanctæ Eccleſiæ.* Hereupon Day is given over, and after ſome Continuances, the Record goes on thus; *Et præceptum eſt Vic' Comit' Heref'ord quod venire faciat coram Domino Rege*, &c. *tot & tales*, &c. *ad inquirendum prout mores eſt*, &c. And a Common Jury is returned, which find him Guilty, and his Goods and Lands are ſeiſed into the Kings Hands, and after Conviction, he is delivered unto the Archbiſhop, to the end (I ſuppoſe) that he ſhould be Degraded; for in this Caſe being High-Treaſon there could be no *Purgation*. See the Record of his Attainder, Hill. 17 *E.* 2. *Coram Rege*, Rot. 87. Dors' *Co.* 3. *Inſt.* 30. *Fuller's Ch. Hiſt. fol.* 107. *Tho. Walſingham, fol.* 199. It appears by the Record it ſelf, and all the Hiſtories of thoſe times, what Artifices were uſed, and with what Induſtry every Stone was turned by the Clergy, to keep the Biſhop from the Juſtice of the Nation; and is it to be ſuppoſed, that they would wave their *Jus Paritatis*, if they had it? We have a world of Complaints in *Walſingham*, and other old Monks, againſt the whole Proceeding, but not one word of any Injury done to their Peerage.

Baker 124. *Co.* 2. *Inſt.* 634.

The next Precedent is in *Trin.* 30 *E.* 3. Rot. 11. *John de Iſle* Brother to *Thomas Hen* Biſhop of *Ely*, was Indicted in *Huntington*, that he with divers others, *per aſſenſum & procurationem Epiſcopi prædict'* 28 *E.* 3. *Die Lunæ poſt Feſtum Sancti Jacobi*, burnt the Houſe of the Lady *Wake*, at by *Sommerſham in Comitat. prædict', & quod prædict' Tho. Epiſcopus ſciens prædict' combuſtionem per prædict' ſervientes ſuos eſſe factam, dictos ſervientes apud* Sommerſham *prædict' poſtea recepit*, &c. And alſo it was found before the Juſtices and Coroners, that 29 *E.* 3. the ſaid Biſhop was guilty *de aſſenſu* of the Murder of one *William Holme*, ſlain by *Ralph Careleſſe* and *Walter Repton*, called *little Watt*, upon Malice conceived againſt *Holme*, becauſe he followed the Suit of the Lady *Wake*; the Principals were attainted by Owtlawry, the Biſhop was Arraigned, and upon queſtion, how he would be tryed? He anſwered, *Quod ipſe eſt membrum* Domini Papæ, *& quod ipſe ab ordinario ſuo viz. venerabili Patre Domino* Simone Archiepiſcopo Cant. *Angliæ Primat reſpondere non poteſt, & ſuper hæc Dominus* Archiepiſcopus *præſens hic in Curia petit quod dictus Epiſcopus* Elienſis, *de feloniis prædictis ſibi impoſitis hic coram* Laico Judice *non cogatur reſpondere; & ut ſciatur inde rei veritas per inquiſitionem Patriæ præcept' eſt Vicecom.* &c. *Ad quem diem*, &c. *Jurat' trial.* &c. *dicunt ſuper Sacramentum ſuum quod idem* Epiſcopus *eſt in nullo culpabilis; ſed dicunt quod idem* Epiſcopus *poſt feloniam factam ipſos ſervientes recepit ſciens ipſos feloniam feciſſe*, &c. *Et ſuper hæc prædict'* Archiepiſcopus *præſens in Cur' petit ipſum tanquam Membrum Eccleſiæ ſibi liberari, & ei liberatur cuſtodiend' prout decet.* Here is a Biſhop Indicted, Arraigned, Tryed by a Common Jury, and Convicted as acceſſory to ſeveral Felonies, as burning of a Houſe, and killing a Man, both before and after the Felonies committed: And it is obſervable, the Jurors were tryed as appears by this Record, and that proves the Biſhop had his

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Challenges to them at his Tryal: And is it not very ſtrange that they ſhould proceed at this Rate againſt a *Peer of the Realm*, over whom they had no Juriſdiction, and a Biſhop too, at ſuch a time when the Clergy were the onely men about Court; as *Simon Langham*, Archbiſhop of *Canterbury*, Lord Chancellor; *William Wickham* Archdeacon of *Lincoln*, Keeper of the Privy Seal; *David Willer* Parſon of *Somerſham*, Maſter of the Rolls; ten beneficed Prieſts, Maſters of the *Chancery*; *William Mulſe* Dean of S. *Martins le grand*, Chief Chamberlain of the *Exchequer*, Receiver and Keeper of the Kings Treaſure and Jewels; *William Aksby* Archdeacon of *Northampton*, Chancellour of the *Exchequer*; *William Dighton* Prebendary of S. *Martins*, Clerk of the Privy Seal; *Richard Cheſterfield* Prebend of S. *Stephens*, Treaſurer of the Kings Houſe; *Henry Snatch* Parſon of *Oundell*, Maſter of the Kings Wardrobe; *John Newnham* Parſon of *Fenny-ſtanton*, one of the Chamberlains of the *Exchequer*; *John Rowſeby* Parſon of *Harwich*, Surveyor and Controller of the Kings Works; *Thomas Brittingham* Parſon of *Asby*, Treaſurer to the King for the part of *Guiſnes*, and the Marches of *Calice*; *John Troys* a Prieſt, Treaſurer of *Ireland*. Theſe I have ſpecified here, becauſe when any Examples are put of Juſtice had againſt Eccleſiaſtical Malefactors, there are a ſort of people who preſently cry out, *Their wings were clipt: They were under contempt and hated by the Laity*, &c. But what Credit is to be given to them, may be gathered from what hath been ſaid.

Baker 141.

Thomas Merkes Biſhop of *Carliſle*, was in the 2 *H.* 4. Indicted of Conſpiring with *Holland* Earl of *Kent*, and the Dukes of *Exceter* and *Surrey*, and the Duke of *Aumerle*, *Montacute* Earl of *Saliſbury*, *Spencer* Earl of *Glocester*, and others, to kill the King: he was thereupon Arraigned before *Thomas* Earl of *Warwick*, and other Juſtices of *Oyer* and *Terminer*, in *Middleſex*, and Tryed by a Common Jury, and found Guilty; afterward the Record was removed to the *Kings Bench*, and the Biſhop put into the *Marſhalſea*, and afterward he is brought to the Bar, and being asked, if he had any thing to ſhew why Judgment ſhould not be given on him, he pleads his Pardon, and it is allowed: *See the Record of his Attainder*, *Hill.* 2 *H.* 4. *Coram Rege*, *Rot.* 6. *Co.* 2. *Inſt.* 636. 3. *Inſt.* 30.

But to come ſomewhat nearer our times; *Fiſher* Biſhop of *Rocheſter* is Indicted, Arraigned, and Tryed by a Common Jury, for ſpeaking Treaſonable Words againſt an Act of Parliament made the 26 of *H.* 8. making the King Head of the Church, and aboliſhing the Authority of the *Pope* of *Rome*; and was Condemned at the *Kings Bench*, and Executed, *Br. Tit. Tryal* 142. *Inqueſt* 99. 27 *H.* 8.

The laſt that I ſhall name, is that Holy and Renowned *Martyr*, Archbiſhop *Cranmer*, who was Tryed with Lady *Jane Gray*, and her Husband Lord *Guilford*, and two younger Sons of the Duke of *Northumberland*, *Ambroſe* and *Henry*, at *Guild-Hall*, before the Lord Mayor and Judges, the Third Day of *Nov.* in the Firſt Year of Queen *Mary*'s Reign, 1553. Where they were all found Guilty, and Condemed of High Treaſon. None of theſe were Executed upon this Judgment, except Lady *Jane Gray* and her Husband, who upon a Second Miſcarriage of her Father the Duke of *Suffolk*, in joyning with Sir *Thomas Wyat* to oppoſe King *Philip*'s Landing, were Executed in the *Tower* the 12th of *Febr.* following: On the 20th of *April* following, *Cranmer*, *Ridley*, and *Latimer*, were adjudged Hereticks at *Oxford*, and Degraded by Commiſſion from the *Pope*, and a little after Cardinal *Poole* ſucceded *Cranmer*, who was burnt as a Heretick 14th of *Febr.* 1556. All this is known to thoſe that are acquainted with the Tranſactions of thoſe times; and therefore it is evident both from the Authority of Learned Men, and the Practice of all Ages in all times, that Biſhops have been Tryed by Common Juries: And ſure it was not without ground that ſo Grave and Judicious an Author as *Camden*, ſhould ſay, That the Spiritual Lords enjoy all the Priviledges that Temporal Lords do, ſaving only the buſineſs of Tryal by Peers.

Having thus proved what I before aſſerted concerning the Tryal of Lords Spiritual; I ſhall in the next place conſider the Anſwers that are generally made to theſe Arguments and Authorities. Thoſe I obſerve to be principally two:

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1. They will very well agree with those Authors that say, Bishops are not to be Tryed by Peers; but then (say they) it was not for want of Peerage, but because they would not be put to answer for any Capital Crime before Lay-Judges.

2. They say, that if it happened that at any time a Bishop was Tryed by Lay-men and by Common Juries, then they were first Degraded.

If there were no more to be said for this, the very reading of the fore-mentioned Precedents would easily make appear the weakness of these Objections; for it appears by the very Records, that their Priviledge of Clergy was insisted upon, and that with a great deal of Zeal and Ferveney; insomuch that the Passage of the Bishop of *Hereford*, is a thing taken notice of in a special manner by all the most Famous Historians of this Nation; and it is generally agreed, that about Fourteen Bishops came with their Crosses erected to the place of Judgment, threatning all people with Excommunication that offered to oppose them in that which they intended; and yet we find that he was not delivered till after he was found Guilty: And it's manifest from all the other Precedents, that they were found Guilty, and most of them Condemned to die upon the Verdict of Twelve Lay-men. But as to the business of Deprivation, you may observe, that throughout the whole Records they are named Bishops, as *Episcopus Herefordensis*, *Eliensis* and *Roffensis*, which could not be if they were Degraded; for then these Titles were not rightful additions in Law. And although it being evident that so it was *de facto*, is a sufficient Answer to the Objections; yet for more abundant satisfaction, I shall be somewhat more large in this, and shall shew that so it ought to be *de jure*.

In handling this Point, I shall consider these following Particulars:

1. To whom this *Privilegium Clericale*, or Exemption from Temporal Jurisdiction, ought to have been allowed?

2. I shall consider somewhat of the Nature of this Exemption and Immunity, and how far they were exempted from Secular Power.

3. I shall examine in what Cases it was allowed, and in what, not.

4. At what time.

5. Upon what account it was that Clergy-men were delivered to their Ordinaries in those Cases where the benefit of Clergy was not allowed.

And lastly, I shall shew at what time regularly they were Degraded.

I. As for the first, It was generally allowed to all within Holy Orders, whether Secular, or Regular, and in an equal Degree to all such, not respecting Superiority, or Inferiority: The poor Country-Parson had as good and as large a Right to it, as my Lord Bishop. This is proved, first, From the Canons that gave this Immunity; the first (I think) were made by Pope *Gaius*, and those run; *Clericus coram Judice Seculari Judicari non debet nec aliquid contra ipsum fieri, per quod ad periculum mortis vel ad mutilationem membrorum valeat pervenire*, &c. See *Linwood Tit. de foro compet. c. contingit. Polichro. lib.* 4. *c.* 24. *of Pope* Gaius, *and* Onuphrius *in his Comment upon* Platina, *in the life of that Pope*. Therefore seeing he cannot take any advantage of these Canons, except as *Clericus*, and must claim it by the same Name that inferiour Priests do, he must have it in the same Degree. But that which is a great deal stronger than the Construction of Canons, is the Confirmation that is made by our Acts of Parliament; this Priviledge is granted to all that are *Clerici*, or *Clerks* in French, and *Clergy-men* in English; and to all such indefinitely without distinction, or respect of the several Ranks and Degrees of men within Holy Orders: So you will find it in *Marlebridge c.* 28. *West.* 1. *c.* 2. *Art. Cler. c.* 15. 25 *E.* 3. *c.* 4, & 5. 4 *H.* 4. *c.* 3. and the rest. So that without all question, a Bishop can pretend to no more Priviledge than any other Clerk *causa qua supra*. This I thought fit to observe first, because that every Authority and Precedent that I shall bring of an inferiour Priest, is as strong for my purpose, as if it were of a Bishop.

II. As for the second Point, I shall not need to be very large upon it, but shall observe one thing which will be serviceable to my present purpose, and that is this: That every Temporal Magistrate and Judge of this Kingdom, hath, and in all times ever had, by the Common Law, Jurisdiction over every Subject in the same Degree

of Nobility that was reſident within the Verge and local extent of his Juriſdiction: This Power and Authority of his being Univerſal, he was never bound to take notice of the Priviledges and Immunities of any particular Orders and Societies of Men, if they themſelves would not take advantage of it; ſo that this ſame *Previlegium Clericale* was no abſolute exemption from Secular Authority, ſo as to make all Proceedings before a Secular Judge, to be *Coram non Judice*: but the end and deſign of it was, that when any Clergy-man was Arraigned as a Malefactor before a Secular Judge, then in ſome Caſes, before he ſuffered the puniſhment that was due by Law, he was delivered to his Ordinary to make his Purgation; if he could, then his Ordinary diſcharged him; but if he could not, then he was Degraded and ſent back to the Temporal Magiſtrate to ſuffer puniſhment according to his Demerits. That the Proceedings of a Secular Judge upon one within Holy Orders, are not *Coram non Judice*, might be proved both out of Civilians and Canoniſts; but that would not be much to the purpoſe if I ſhould, and therefore I ſhall forbear; only ſhall take notice of a Paſſage in Dr. *Ridley's View of the Civil and Eccleſiaſtical Law*, pag. 86. *If a Clerk* (ſays he) *be firſt Arreſted by his Spiritual Judge, and found guilty, he ſhall be Degraded and delivered over to the Temporal power; but if he be firſt Arreſted by the Secular Magiſtrate, and Tryed, and found Guilty, he ſhall be delivered to the Biſhop to be deprived, and then delivered back to puniſhment.* The ſame in effect he ſaith *p.* 158. whereby he doth allow, that according to the Eccleſiaſtical Law, the Temporal Judges were allowed to have Juriſdiction over men within Holy Orders: But let him or any of the Civilians or Canoniſts ſay what they will, it's no great matter; we muſt conſider what the Law of *England* ſaith in this caſe: for the Canons never were in force in *England* any further than they were voluntarily received, and ſo tranſmitted as a common Uſage or Cuſtom to Poſterity by Tradition, and ſo became part of the Common Law; or elſe were confirmed by Act of Parliament, and ſo became part of our Statute-Law, of which more hereafter. And that by the Law of *England* the Proceedings againſt Eccleſiaſtical Perſons before a Secular Judge, are not *coram non Judice*, I prove by theſe Caſes: An Appeal of Robbery was brought againſt a Monk, who was tryed and acquitted; upon this the Abbot and the Monk brought a Writ of Conſpiracy againſt divers who procured and abetted the ſaid Appeal: whereupon the Defendants appear, and go to Tryal; but the Abbot and Monk get a Verdict and Judgment to recover 1000 Marks damages, *Co.* 2. *Inſt.* 638. But it is certain, that a Writ of Conſpiracy cannot lye except the Plaintiff had been *Legitimo modo acquietatus*, and that he could not be, if the whole Proceedings upon the Appeal had been *Coram non Judice*. So if at the Common Law a Clergy-man had been Indicted of Felony, and had confeſſed the Fact in Court, he could not have had the benefit of his Clergy, becauſe the end of granting it, was, that he might make his Purgation before the Spiritual Judge, but that he could not after he had confeſſed the Fact in Court. *Co. ubi ſupra, Stamford* 124. And yet no Confeſſion *coram non Judice* is concluſive. All which doth evidently prove, That the allowance of thoſe Canons which gave the firſt birth to this Immunity, did not trench to the prejudice of Temporal Judges, ſo as to bar them of that Juriſdiction which they have over every Subject by the Common Law: And the Nature of it will further appear, if we take into conſideration the Third Particular, which is this:

III. In what Caſes the benefit of Clergy was allowable, and in what not; This Immunity was allowed in *England* long before any Statute was made for its confirmation; it was allowed onely in ſuch caſes as were judged reaſonable, but never in full ſatisfaction to the demands of the Clergy: *Kellaway.* 7 *H.* 8. 181. *b.* But the Clergy (as their Cuſtom then was) were willing to improve any Conceſſion to their beſt advantage, according to the common Proverb, *When they had got an Inch, they would take an Ell.* And to that end did with a great deal of fervency and zeal (no doubt) inſiſt upon their Priviledge as an abſolute Exemption from all Temporal Juriſdiction, to all intents and purpoſes, extending to all Crimes and Offences whatſoever, and thundring out Excommunications, and ſuch like Maledictions, forced ſome people for quietneſs ſake to comply with them, (as appears by *Bracton, lib.*

lib. fol. 123.) to the great incouragement of all ſorts of Villanies and Outrages, and conſequently to the grievous oppreſſion and vexation of the Subject: for this aſſurance, or at leaſt hopes of Impunity, let looſe the Reigns of Rapine and Violence, and was the moſt effectual courſe that could be taken for the diſſolution of any Government, and the utter deſolation and ruine of any Country whatſoever. To give a check to this exorbitant Licentiouſneſs, ſtrict care is taken by the Judges and Magiſtrates, that Juſtice be duly executed, and Offenders legally puniſhed; and therefore the *Privilegium Clericale* not to be allowed in any Caſe otherwiſe then according to the ancient Cuſtom: Hence were the ſeeds of Envy and of a very laſting Diſcord between Church and State ſown; nothing but Animoſities, Rancour, Revenge and Hatred, is the Subject of the Hiſtory of thoſe times, eſpecially the time of *Thomas Beckett*: Bulls, Citations, Excommunications, on the one ſide, and ſeiſing of Temporalities, Impriſonment and Baniſhment, on the other ſide, were the Complements that people were entertained with in thoſe days: Theſe Differences grew to ſuch a height, that although through a formal Reconciliation, both Parties ſeemed to be pacified; yet the Root of the Matter remaining untouched, the Fewds break forth, and the Matter muſt be decided by Act of Parliament: And ſo I ſhall by the conſtruction of theſe old Statutes, and other Precedents, give a direct Anſwer to the Queſtion.

Vide Parliam. held at Clarendon. 11 H. 2.

1. It is undeniable, that *Privilegium Clericale* was never allowed to any that were Guilty of *Crimen læſæ Majeſtatis*: The firſt Statute that we find among the Printed Statutes, which doth directly ſpeak of it, is *Weſtm.* 1. *c.* 2. which is declarative of the Common Law by the expreſs words of the Statute, *Solonque le Cuſtom avant ces heures uſe*, but ſaith not one word of Treaſon, only allows the Priviledge in Caſes of Felony, *Si Clearke ſoit priſe pur rette de Felony*. Wherefore this Statute being in the Affirmative, determines nothing concerning Treaſon, but leaves that as it was before at the Common Law. Not long after the Clergy renewed their Complaints, and among the reſt, complain that Secular Judges have paſſed Judgment of Death upon men within Holy Orders, and claim their Priviledge abſolutely and generally in Articles ſeveral, which they preſented to the King in Parliament. To this they receive Anſwer by the Statute commonly called *Articuli Cleri*, in theſe words: *Clericus ad Eccleſiam confugiens pro Felonia pro Immunitate Eccleſiaſtica obtinenda*, &c. *gaudebit Libertate Eccleſiaſtica, juxta laudabilem conſuetudinem Regni hactenus uſitatam.* This being an Anſwer much like the former, did not ſufficiently anſwer their Deſires, expreſſing only Felony; nor on the other ſide did it hinder the Temporal Judges from proceeding againſt them, as againſt Lay-men in Caſes of High Treaſon, as they had done always before: Wherefore they do afterwards, *viz.* in the 25th of *E.* 3. make a grievous Complaint, that the Kings Judges had given Judgment of High Treaſon againſt *Houby* and *Cibthorp*, Prieſts, and ſeveral other Religious Perſons, whereby they were Hanged, Drawn and Quartered, to the great Diſhonour of the Church, *&c.* To this they have a direct Anſwer by the Statutes of 25 *E.* 3. *c.* 4, & 5. Whereby (reciting their Complaint) it is Enacted and Declared, that all Clergy-men Convicted for Treaſon or Felony againſt any other Perſon than the Kings Majeſty, ſhall enjoy the Liberties of the Holy Church, *&c.* and from henceforward (but never before) the benefit of Clergy was allowed in Petit Treaſon, till by 23, & 25, & 32 *H.* 8. it was taken away; but High Treaſon is excepted out of that Statute of *E.* 3. and therefore was ever ſince puniſhed without the allowance of Clergy as it was before: And accordingly the Abbot of *Miſſenden* was Condemned to be Hanged, Drawn and Quartered, *Pro contra factione & reſectione legalis monetæ Angliæ, Mich. coram Rege* 31 *E.* 3. *Rot.* 55. And it is taken for a General Rule, *Trin.* 21 *E.* 3. *coram Rege, Rot.* 173. *Quod privilegium Clericale non competit ſeditioſo equitanti cum Armis*, &c. Thus I have ſhewn that in the Caſes of *Orleton*, *Merkes*, *Fiſher*, and *Cranmer*, the benefit of Clergy could not be allowed by the Law of *England*, they being Caſes of High Treaſon.

But in Caſes of Felony, the benefit of Clergy was always allowed, till it was taken away in Caſes of Murder *ex malitiâ præcogitata*, Poyſoning, Burglary, Robbery, *&c.*

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by the 1 & 6 *Edw.* 6. *cap.* 12. & *cap.* 10. This is ſufficient for this Point.

IV. The Fourth Queſtion, At what time the benefit of Clergy ought to be pleaded or demanded? comes to be examined. I conceive, that the common practice both before and after the Statute of *Weſtm.* 1. was to deliver them to the Ordinary after Conviction, and therefore they would not ſuffer them to demand it before: My Reaſon is, becauſe the Statute of *Weſtm.* ſaith thus; *Si Clearke ſoit priſe pur rette de felony, & ſi il ſoit per l' Ordinarie demand, il luy ſoit livere ſolonque la priviledge de Saint Eccl'* &c. *ſolonque le cuſtom avant ſes heures uſe.* This Statute grants no new Priviledge, but confirms only that which they had before: And as for the time of allowing the Priviledge, the words of the Statute are ſo ambiguous, that it is very hard to determine the Queſtion from thence; only the Statute refers it to the Cuſtom of the former Ages: for the Priviledge of the Holy Church is to be allowed *ſolonque le cuſtom*, &c. Now all the Judges of *England* did after this Statute determine, that they would not deliver any Priſoner to the Ordinary till he was firſt Indicted, and alſo thereupon Arraigned, and till it was Inquired by an Inqueſt upon his Arraignment, whether he were *Guilty* or not *Guilty*; if not Guilty, then he was diſcharged without any more ado; but if Guilty, his Goods and Chattels, Lands and Tenements were forfeited, and his Body delivered to the Ordinary: So ſaith *Britton*, cap. 4. f. 11. *Si Clearke encoupe de felony allegga Clergie, & ſoit per l' Ordinarie demand, donque ſerra enquiſe comment il eſt miſcrue* (*i.* culpable) *& ſileſt trovement miſcrue donque il alera quite. Et ſil ſoit & trove miſcrue, ſes Chateux ſerroient taxes, & ſes terres priſes in maine le Roy, & ſeu corps deliver al Ordinarie.* The ſame you will find in the *Mirr. c.* 3. *Co.* 2. *Inſt.* 164. in his Expoſition upon that Statute; and *Stamford* 131. And this we muſt ſuppoſe to have been the practice before the Statute; becauſe the Statute appoints the ancient Cuſtom to be obſerved, and there were none that knew the ancient Cuſtom ſo well as the Judges of thoſe times; and therefore this determination of the Judges was either according to the Cuſtom *avant ſes heures uſe* (as the Statute ſpeaks) or elſe it was not according to Law: but that is abſurd, eſpecially ſeeing it was not only one reſolution, but the conſtant practice ever ſince; for in the Record of all Indictments of Clergy-men, if they refuſed to anſwer, but pleaded their *Privilegium Clericale*, and were demanded by their Ordinary; the Record is entred —*Sed ut ſciatur qualis ei liberari deberat*, (i. whether Guilty or not Guilty) *inquiratur inde rei veritas per patriam.* And in the Year-Books we have multitudes of Caſes that do prove it, as you may ſee in the Margent; the ſame is proved by the fore-mentioned Record of the Biſhop of *Ely*, 30 *E.* 3. And there is a like Caſe, 40 *E.* 3. *Fitz. Tit. Cor.* 91. And the Statute of 25 E. 3. *c.* 4. ſaith expreſly, That all Clergy-men Convict of Treaſon and Felony, &c. Which intimates that Clergy was not to be allowed till after Conviction. And ſo I have anſwered what ever they can object againſt the above-cited Authorities and Precedents from the benefit of Clergy; and therefore ſhall now briefly conſider the two laſt Particulars.

Fitz. Tit. Cor. 41. 7. 8 E. 2. 17 E. 2. 380. 19 E. 2. 233.

V. In the fifth place I am to conſider, Upon what account it was that Clergy-men were delivered to their Ordinaries, in thoſe Caſes where the benefit of Clergy was not allowed: The delivering of a Clerk Convict to his Ordinary, could be only for theſe ends, either that he might make his Purgation before his Spiritual Judge, or that the Ordinary might Degrade him, and then deliver him over to the Secular Power, to be puniſhed according to Law as a Lay-man, leſt Scandal and Indignity ſhould be put upon the Church: The former is onely in Caſes where Clergy is allowed; for where there is no Clergy, there can be no Purgation: The latter is, where no Clergy can be allowed: The former is *de Jure*, and cannot be denied. I do not mean *Jure Canonico*, but is a Cuſtom which hath been allowed time out of mind, and confirmed by ſeveral Acts of Parliament; and for that reaſon only, I ſay, it is *de Jure*. The latter is, *de Gratia*, and Arbitrary; for our Judges have had ſuch an Honour and Eſteem for the Dignity of a Prieſt, that they uſually did deliver them to the Biſhop to be Degraded, before the Sentence of Law was executed upon them. So it is in all Caſes of High

Vide Co. 2. Inſt. 636.

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Treason, for there being no room for Purgation, the Judges are not at all obliged to deliver him, but out of favour they were wont to do it, to the end he might be Degraded; and if that Custom were still observed, there were no great harm in it: yet in *Trin.* 24. *H.*8. in *Spilmans* Reports we have a Case of one *George Nobles* a Priest, who was Convicted at the Gaol-delivery of *Newgate*, of Clipping the Kings Coin; and by the Resolution of all the Judges, they passed Sentence of Death upon him before any Degradation, and he was accordingly Executed in his Canonical Vestments. In a Record upon the Parliament, *Roll* 21 E. 1. *Rot.* 9. it is to be found, that one *Walter. de Berton* was Convicted of Counterfeiting the great Seal; but the Record saith, *Qui convictus tradatur Episcopo Sarum qui tum petiit ut Clericum suum sed sub pena*, &c. *& sub forma qua decet quia videtur Concilio quod in tali casu non admittenda est purgatio.* Here it appears a person Convicted was delivered to his Ordinary in case where there could be no Purgation, and so no benefit of Clergy; and therefore it is evident that it was to the end he should be Degraded, and upon that the Delivery is with a *Subpœna*, which can be understood no otherwise but that he should re-deliver him.

VI. As to the last point, at what time they ought to be Degraded, may be determined partly from what hath been said already; for the end of Degradation, is only to prevent that Scandal and Irreverence which would otherwise be thrown upon that honourable Profession, which all sober and true Christians are very tender of: And certainly there cannot regularly be any Deprivation or Degradation before Conviction; for no Clerk can be Deprived or Degraded of any Benefice or Dignity, except upon full Evidence he be found such and such a person as is uncapable of enjoying it. And as a Bishop cannot refuse a Clerk presented, except there be special cause for it, as *criminosus*, &c. so neither can he deprive one that is already Inducted without special cause; and in any Court of Record the Cause must be specially pleaded, because it is Traversable, *Co. lib.* 5. 2. *part. fol.* 58. *Specots* Case. Suppose then that any Ecclesiastical Person is Arrested for Treason, the Ordinary cannot deprive him, except he first pass Sentence upon him, that he is *criminosus*; but he cannot pass Sentence of Deprivation upon him, while he is under the Custody of the Temporal Magistrate, and before he is delivered to him; for it is the greatest piece of Injustice in the World, to Condemn a man before he be heard: indeed our Law allows that in case of Outlawry, but that is when he may appear, and yet after Five solemn Proclamations, will not; but it is against the Law of Reason, and the Laws of all Nations, to Condemn a man that is absent, when at the same time they know he cannot appear; and therefore no Clerk can be deprived till he be delivered by the Temporal Judge: and I have already proved that there can be no Delivery till after Conviction; so that it doth necessarily follow, that there can be no Deprivation till after Conviction; and for further confirmation, see *Ridley, ubi supra, Bracton. lib.* 3. *fol.* 123. *Clericus, Ordinario traditus si in purgatione defecerit, degradari debet, Fleta lib.* 6. *c.* 36. *Degradare potest Episcopus criminum convictos.* Whereby it appears, first, That before Degradation, they must be allowed the benefit of making their Purgation, if they can, and that they have not except they be present when they are Condemned. 2ly, That they must be *Traditi* or *Convicti* before Deprivation.

The Case of a Bishop seems parallel to the Case of any other Clerk; for the King is Patron of all the Archbishopricks and Bishopricks of *England*, they being all of his and his Progenitors Foundation: They must either therefore be Donative or Eligible; before King *John*'s time they were Donative; *per traditionem Annuli & Pastoralis baculi*: But he by his Charter 15. *Jan. Anno Regni* 17. granted that they should be Eligible, and therefore were made to be in the nature of Advowsons presentable: when therefore the King did nominate or present such a person to the Bishoprick, that person could not be refused without some special cause of refusal; but if it did appear that he was either Infamous, Irreligious, Schismatick, Heretick, Miscreant, Infidel, *mere laicus*, &c. I conceive he might well be refused; or else to what purpose issued forth the *Conge d'estier*? What signified King *John*'s making them Eligible? And therefore there being the same Reason and Law of Degradation or Deprivation

tion after actual Inveſtiture, that there is of refuſal before: I infer there can be no Deprivation of a Biſhop without Cauſe, and that Cauſe cannot be adjudged to be in him before he be heard, and have the Juſtice to defend himſelf as well as he can, allowed him; and conſequently no Deprivation till after delivery out of the hands of the Secular Power, which is in no caſe till after Conviction. Theſe Particulars explained and proved, will ſatisfie all thoſe whoſe Sentiments are regulated according to the Standard of Reaſon, that there is no ſtrength in any of thoſe Objections which ſome ignorant people do ſo much inſiſt upon.

Having thus by the Rules of Law, the Authority of the moſt Renowned Authors, and Variety of Precedents, proved, That a Biſhop is no Peer, in reſpect to a Temporal Lord, within the intent and meaning of the 29th of *Magna Charta*: It doth naturally follow, that he hath no Right to claim any Juriſdiction or Right of Judicature upon the Life and Death of a Temporal Lord; for otherwiſe he might ſuffer Death or Baniſhment, or Impriſonment, by the Judgment of thoſe who are not his Peers, contrary to the Fundamental Laws of *England*, and the Liberties of every Subject. And thus I conclude the firſt Point.

The ſecond Point that I offered to demonſtrate, is, That the Biſhops Votings in Capital Caſes, is contrary to the practice of all Ages untill this day.

In the firſt place, Let us examine how it was before the Reign of *Henry* the Second: It muſt not be expected that this ſhould be proved from the Records and Journals upon the Parliament Rolls, for their Antiquity will not reach ſo high as to do any conſiderable Service in this matter; but I ſhall give the ſame proof for this, that any man can give for Tryals by Juries before *Magna Charta*; that is, an Act of Parliament making Recognition of ſeveral ancient Cuſtoms practiſed beyond the Memory of thoſe that then lived; and that I hope will be ſufficient Evidence: The Statute that I mean, was made at that Great Parliament which was held at *Clarendon*, the 10, & 11 of *H.*2. *Anno Dom.* 1164. In the Preamble it is, *Recognizantur Advice conſuetudines*, which proves it is declarative of the Common Law. The Eleventh Article runs in this manner, *Archiepiſcopi, Epiſcopi, & univerſa perſona* (holding any Eccleſiaſtical Dignity) *qui de Rege tenent in Capite, habeant poſſeſſiones ſuas de Rege ſicut Baroniam, & inde reſpondeant Juſticiariis & Miniſtris Regis, & ſequantur & faciant omnes conſuetudines Regias, & ſicut ceteri Barones debeant intereſſe judiciis curiæ Regis cum Barontbus quouſque perveniatur ad diminutionem membrorum vel ad mortem.* Here is their Juriſdiction expreſly limited, that it ſhall not extend *ad diminutionem membrorum vel ad mortem.* And this Act of Parliament is declarative of the Common Law, as appears by the Preamble, and the conſtruction of moſt Authors that mention it. *In this* (ſaith *Doderidge*) *certain Recapitulations are made of the Kings Prerogative and his Peoples Right, then ſought to be infringed by the Pope and his Clergy.* So ſaith my Lord *Cook*, 2. *Inſt.* 631. and *Selden*, *Titles of Honour*, 582. Seeing therefore there can be no time aſſigned when this ancient Cuſtom which is here recapitulated, was not, conſequently this limitation muſt be ſuppoſed to be as ancient as their ſitting in the Houſe of Lords: But to prove that this Conſtitution of *Clarendon* (as ſome call it) is an Act of Parliament; *Matthew Paris* ſaith, *Præſentibus etiam Archiepiſcopis, Epiſcopis, Abbatibus, Prioribus, Comitibus, Baronibus & Proceribus Regni.* *Roger* of *Hoveden* ſaith expreſly, that *Clerus & Populus Regni* were then aſſembled, and ſo mentions it as a full Parliament. *Goldaſtus Conſtit. Imper. Tom.* 3. 347. ſaith, There were added to the Clergy, *Nobiliores & Antiquiores Regni.* *Fitz Stephens* calls it, *Generale Concilium.* And laſtly, our Common Lawyers do take it for granted and undiſputable. My Lord *Cook in* 2. *Inſt.* 631, and 638. calls it, *The great Parliament that was held at* Clarendon: So *Bracton*, *lib.* 3. *f.* 136. And this very Article above-mentioned is in all the ſaid Authors; and likewiſe in *Roger* of *Wendover*: but that which is moſt conſiderable, is, that we have *Gervaſius Dorobernienſis*, an Author that lived in that Age, and a Perſon within Holy Orders too, reckoning this very Article among the Laws that were made at that Parliament, in the 68. *Page* of his Book. But admitting it were no Parliament, but only a great Councel of Peers; yet that is as well for my purpoſe, becauſe that the

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Proceedings of ſuch a Council are Matters of Record, and therefore a Recognition or Declaration of ancient Cuſtoms, and of the Common Law made in ſuch a Council, is as undeniable proof, as if it were a Declaratory Act of Parliament; for the force of ſuch an Act is only in point of Evidence, and doth not Enact or Conſtitute any new Law. But as there is no queſtion but that it is an Act of Parliament, the Aſſembly being *a Generale*, or *Commune Concilium*, which is always underſtood of *the Parliament*, *Co. Inſt.* 110. *a.* So except it can be proved this Statute was repealed, I have made good my Aſſertion, without ſaying any more; for admitting that it had not been ſo frequently practiſed, as I in his proper place ſhall make appear it was; yet ſtill it is valid and a ſtanding Law: for no Statute loſeth its force by *Non-uſer*, *Co.* 1. *Inſt.* 114. although Common Law, or particular Cuſtoms, may.

But this Statute we find was afterward confirmed: for ſaith *Roger de Hoveden* a Monk, p. 30. It was Ordained in a Councel at *Weſtm.* That no Clergy-man ſhould *Agitare Judicium*, &c. and he that did, was to be deprived of his Dignity and Orders.

That theſe Conſtitutions were punctually obſerved in after Ages, is the next thing to be proved: And the firſt that I ſhall mention, is the Judgment againſt the *Spencers*, 15 *E.* 2. The Lords Spiritual did withdraw, as in right they ought. Theſe *Spencers* were men that were great Favourites of that King; for they had ſucceeded *Peter Gaveſton* both in the Kings Favour, and in Places of Profit and Truſt about Court: and although the Lords had then prevailed with the King to conſent to an Act of Parliament for their Baniſhment, yet afterward the Tide turned, the *Spencers* were called again to Court, and their Enemies ſeverally proſecuted; whereupon the greateſt part of them departed from Court, and through the Intereſts which the *Spencers* had with the remaining Lords, the Judgment which ſtood upon Record againſt them was reverſed for ſeveral Errors; one of which was, *The abſence of the Prelates*: but notwithſtanding this, the Judgment is afterward Affirmed by an Act of Parliament, in the firſt year of the ſucceeding King: *Vide* 1 *E.* 3. *c.* 1, & 2.

And that the Abſence of the Prelates is no cauſe of Reverſing a Judgment, ſee the Caſe of the Earl of *Saliſbury*; who in the 2 of *H.* 5. petitioned the Houſe of Lords to Reverſe a Judgment that was given againſt the Earl his Father, *An.* 2 *H.* 4. and Aſſigns for Error, That the Lords Spiritual were abſent: The Caſe was very much Debated, and at laſt it was adjudged no Error; and accordingly the Judgment was Affirmed. But of this I ſhall have occaſion to treat more at large by and by: See *Cotton*, 539.

Anno 4 *E.* 3. In the Parliament at *Wincheſter*, *Die Lune poſt Feſtum Sancti* Gregorii, The Earl of *Kent* was brought before the *Counts*, *Barons & autres Grandees & Nobles*, *in meſme le Parliament*, &c. for Treaſon, *derſ. clauſ. n.* 38.

Anno eodem, in the Parliament at *Weſtm. poſt Feſtum Sanctæ Katherinæ*; The Articles of Treaſon being read againſt *Mortimer* Earl of *March*, That he had procured the Death of the late King, and had under-hand-dealing with the *Scots* at *Stanhope Park*, and had been too familiar with the Queen-Mother, by whom ſhe was thought to have been with Child, &c. The King charged *Les Counts*, *& Barons*, *les Peers de ſon Royaume*, to give Judgment: And then it follows, that Judgment was given *Per les dits Counts & Barons les Peers de Royaume*, *come Judges du Parliament*.

Ibid. The King commanded *Les dits Counts & Barons*, *Peers*, &c. to give Judgment on *Simon de Bereford*.

Ibid. The King commanded the ſame againſt ſeveral others, and accordingly *John Matravers* was judged *Per les Peers*, *Counts*, *& Barons*, *aſſembles in Parliament*. And ſo were Four others in the ſame Parliament, all for Treaſon; and not one word of the Prelates, either when the Articles were read, or when Judgment was given: For it is certain, they are never ſpoken of in any Record, but either by the Name of *Archiepiſcopi*, *Epiſcopi*, &c. or *Prelati*, or ſome ſuch Name which doth diſtinguiſh them from the Laity; and if they be ſpoken of, they are always firſt named and put before *Les Counts & Barons*; as at this day, the Records are Entred by the *Lords Spiritual and Temporal*, &c. And for theſe two Reaſons they could not be comprehended

hended under the General words, *Et autres Grandees & Nobles.*

Anno 6 E. 3. *Poſt Feſtum Sancti Gregorii*; The Parliament were commanded to conſult of the keeping of the Peace, and puniſhments for the Breakers thereof; and the Prelates departed *Pur ceo que il ne attinet paſs a eux Conſailer du gard de la Paix ne de chaſtement de tiels Maleſactors:* Yet afterward they came and gave their Aſſent to an Act of Parliament for this purpoſe: The reaſon of which ſhall be conſidered in another place, where we ſhall diſcourſe of their Voting in Bills of Attainder. By this Record it is evident, That the Prelates have no Judicial Power over any Perſonal Crimes, which are not Parliamentary; which doth very much Fortifie the Foundation and Ground of my whole Diſcourſe.

Anno 1 *R.* 2. The Commons prayed that ſuch as gave up *Forth*, &c. *puiſſent eſtre areſpondre a ceſt Parliament & ſolonque lour deſert ſortment punis per agard des Seigniors & Barons.* And thereupon ſeveral were brought before the Lords in Parliament, which muſt be underſtood of the Temporal Lords onely, becauſe the Spiritual Lords are never intended in any Caſe to be mentioned, except they be ſpecially named.

Anno 11 *R.* 2. Divers Matters of Treaſon were to be Treated of, and ſeveral Lords to be Tryed; and therefore the Spirituality did abſent themſelves from the whole Parliament: but before their departure, the Archbiſhop of *Canterbury*, in the Name of Himſelf, and all the Clergy of his Province, made this following Proteſtation:

Quod Archiepiſcopum Cantuarienſem qui pro tempore fuit, nec non cæteros ſuos Suffraganeos Confratres, Co-epiſcopos, Abbates & Priores alioſque Prelatos quoſcunque Baronium de Domino Rege tenentes, in Parliamento Regis ut Pares perſonaliter intereſſe pertinet, ibidemque de Regni negotiis & aliis ibi tractari conſuetis cum cæteris dicti Regni Paribus & aliis conſulere, ordinare, ſtatuere, definire ac cætera facere, quæ Parliamenti tempore ibid. intenditur facien'. Quia in præſenti Parliamento agitur de nonnullis materiis in quibus non licet nobis juxta Sacrorum Canonum inſtituta quomodolibet intereſſe: Non intendimus nec volumus, ſicuti de jure non poſſumus nec debemus: Ad hæc inſuper proteſtamur & noſtrum quilibet proteſtatur, quod propter hujuſmodi abſentiam non intendimus nec volumus, nec noſtrum aliquis intendit nec vult quod proceſſus habiti & habendi in prædict' Parliamento ſuper materiis aut edictis in quibus non poſſumus, nec debemus (ut præmittitur) intereſſe quantum ad nos & noſtrum quemlibet attinet futuris temporibus quomodolibet impugnentur, infirmentur, ſeu etiam renoventur. This was read in full Parliament, and inrolled at the Requeſt of the Prelates: And the like was made by the Biſhops of *Durham* and *Carliſle*: *Cotton* 322. *Co.* 2. *Inſt.* 586.

From this Record you may obſerve:

1. That the Lords Spiritual do acknowledge that they have no Right to be preſent in Caſes of Blood, *Nec poſſumus, nec de jure debemus.*

2. You may obſerve that they did accordingly abſent themſelves, and did thereby yield Obedience to the Parliament at *Clarendon*, and the Conſtitution at *Weſtm.* mentioned in *Roger Hoveden*, *H.* 2. That Clergy-men ſhould not *Agitare judicium Sanguinis*; though they pretended it was in Obedience to the Canons of the Church.

3. You may obſerve that they did not ſtay in the Houſe till they came to the final Queſtion *Guilty* or *Not guilty*, but departed at the firſt beginning of the Buſineſs, *Quia agitur de quibuſdam rebus in quibus non licet nobis intereſſe.* Theſe ſhort Remarks I leave upon it at preſent, but ſhall take it more narrowly into conſideration, when I come to anſwer their Objections, and ſhall go on with Precedents.

In the Reign of *H.* 4. The Earl of *Northumberland* was ſuſpected to have been privy to the Rebellion of his Son *Hotſpur*, who joyned with *Mortimer* Earl of *March*, and *Owen Glendour* of *Wales*, in open Rebellion. In the 5 of *H.* 4. he came and preſented himſelf to the King and Parliament, and Proteſted his Innocency, and challenged his *Jus Pariet atis*, and Right of Tryal by his Peers: Whereupon the Lords (ſaith the Record) made Proteſtation, that the Judgment belonged unto them onely, &c. The Petition being read before the King and the ſaid Lords, as Peers of Parliament, unto whom ſuch Judgments do of Right belong, conſidering, &c. Adjudged

that

that it was neither Treaſon, nor Felony, &c. This was the firſt Proceſs that was made againſt the Earl; but it doth not evidently appear whether they were preſent or abſent, the Roll being Lords indefinitely; yet it is moſt probable that it is meant Temporal Lords onely. 1. If the Spiritual Lords had been preſent, they would have been named by a ſpecial Name, as they are in all other Rolls. 2. We find the Lords Temporal in other Caſes of Life, and Death, claiming the ſame Juriſdiction as belonging to them onely excluſively of the Clergy. *Anno* 4 E. 3. Judgment was given *Per les Countes & Barons, les Peers de la Royaume, come Judges du Parliament.*

But I ſhall leave this, and come to the Proceſs which Iſſued forth againſt him afterward, for the Earl being acquitted, returns home, and within a very little time hath a conſiderable Army in the Field, together with the Archbiſhop of *York*, Lord *Bardolfe*, and others; but their Army ſoon Disbanding, the Earl of *Weſtmerland* comes with a conſiderable Strength for the King, and takes all the Lords Priſoners, except *Northumberland* and *Bardolfe*, who fled into *Scotland*: Whereupon 7 *Hen.* 4. *Rot. Proceſſus coram Domino Rege in Parliamento*, &c. The King commanded the Lords Temporal Peers of his Realm to adviſe what Proceſs to make, and what Judgment to render againſt the Earl of *Northumberland*, and the Lord *Bardolfe*; and then the Record goes on thus: *And then the ſaid Lords Adviſed thereon, and Reported their Opinion to the King.* ——*The ſaid Lords Peers of the Realm, by the Aſſent of the King, Ordained that Proclamations ſhould be made for the ſaid Earl of* Northumberland, *and Lord* Bardolfe *to appear, or elſe to ſtand Convicted of High Treaſon by the Award of the Peers in Parliament.*

The King did further demand the Opinion of the ſaid Lords Temporal, touching the Archbiſhop of York. ——*Unto which the Lords Temporal ſaid*, &c.

By Advice of the ſaid Lords Temporal, the Returns of the former Proclamations *were made at the Parliament-Door, for the ſaid Earl and Lord to appear.*

By Advice of the ſaid Lords Temporal, with Aſſent of the King, the former Proclamations were examined. ——*The ſaid Lords Temporal conſidered of the Errors therein*, &c.

By the ſaid Lords Temporal, with Aſſent of the King, by their Authority new Proclamations were granted. ——*Whereupon the ſaid Lords Temporal then being in the ſame Parliament, by Advice and Conſent of our Lord the King, and by their Authority in Parliament, Awarded the ſaid Earl of* Northumbeland, *and the Lord* Bardolfe, *not appearing upon their Summons, to ſtand Convicted of High Treaſon*, &c.

Here we ſee all was done by the Temporal Lords, from the firſt beginning of the Proceſs until the Judgment, and yet it is ſaid to be Awarded by the Peers in Parliament, although the Spiritual Lords are not ſo much as once mentioned, and conſequently were not preſent at any time whilſt that Matter of Treaſon was handling.

To Enumerate all the Inſtances of this Nature, and to Tranſcribe all the Records of Attainders in Parliament, where the Names of the Lords Spiritual are left out, which infers of neceſſity that they were abſent; would ſwell out this Treatiſe into a greater Bulk than either I intend, or then is in its ſelf convenient. Theſe are ſufficient to prove that Obedience was yielded to thoſe Laws and Conſtitutions of this Land, which were made for this purpoſe. I will mention one Precedent more, and that is the Earl of *Strafford*'s Caſe, 16 *Caroli*: *The Biſhops declined their Suffrages on the Tryal of the Earl of* Strafford, *according to the proviſion of the Canon Law, and the conſtant practice to this day:* (ſays *Baker*, 478) and therefore withdrew: But they deſired a Proteſtation that their Abſence ſhould not prejudice them of that, nor of any other Priviledge competent to them, as the Lords Spiritual in Parliament, might be entred; which was done accordingly.

It may be objected, That this is not to be made uſe of as a Precedent: That (I anſwer) is true as to the Matter of the Charge, and the Nature of the Crime that he was Impeached for; no man muſt by colour of that Act be Adjudged a Traytor, that doth thoſe things which the Earl of *Strafford* did: but as to the courſe of Proceedings, and all other Circumſtances of the Method, it is well enough; for nothing was done in that but what was warranted by Precedents and conſtant practice in Parliament.

And this Difference doth appear from the *Proviso* in the Bill of Attainder, for that is no more but this: *That no Judge or Judges shall hereafter interpret any Act or Acts to be Treason, in any other manner, than he or they should or ought to have done before the making of this Act; and any thing contained in this Act to the contrary notwithstanding.* So that the *Proviso* extends only to the Crimes, but not at all to their manner of proceeding.

From the consideration of these things, That Allegation which is made by some, that they were wont to sit till the final Question, *Guilty* or *Not-guilty*; were put, will plainly appear to be altogether groundless: Because

First, If they have not Parity sufficient to Entitle them to any Jurisdiction in Cases of Life and Death, as I have endeavoured to shew that they have not, in the former part of my Discourse; then it is evident, that they cannot exercise any Judicial Power at all, neither in things præliminary to the Judgment, the Judgment it self, nor in things subsequent to the Judgment: all which do fall within the Conusance of Judicial Power, and do belong to the Office, Power, and Jurisdiction of a Judge. For so saith *Magna Charta, Nemo imprisonetur*, &c. *Nisi per legale judicium parium suorum*, and yet Imprisonment is a thing præliminary to Judgment: The Office of a Judge is to hear first, and then determine, *Oyer* and *Terminer*; but if any man be not duly qualified to be a Judge, then he hath as little power to hear the Cause, or Act any thing in it, as to determine it.

Secondly, The Constitution of *Clarendon*, saith, *Debent interesse Judiciis Curiæ Domini Regu quousque perveniatur ad diminutionem Membrorum vel ad mortem.* This must either be understood to comprehend all precedent and præliminary things, which do relate or tend *ad diminutionem Membrorum*, &c. Or else if we take the words strictly and literally, we must understand the meaning of that great Assembly to be onely for the Exemption of Prelates from doing the Office of Executioners; which is Non-sense: By *Diminutio*, &c. therefore, or *Mors*, we must understand things conducing and tending *ad diminutionem*, &c. or *ad mortem*. The Constitution at *Westminster* is much plainer, *Non debent agitare judicium sanguinis*; the meaning is plainly this, That they ought not to exercise any Judicial Power in Cases of Blood: But a man may exercise Judicial Power *agitare Judicium*; or do the Office of a Judge in a great many things that are both precedent and subsequent to the Judgment; as Awarding of Process, receiving the Charge, &c. Therefore the Bishops ought not to have any præliminary Vote which hath any tendency or relation to a Judgment of Death.

Thirdly, When ever the Clergy, in Obedience to these Constitutions, did withdraw, they left the whole Management of the Business from the beginning to the end to the Lords Temporal, as appears from the Entry of the Records; so it is 4 E. 3. in the Earl of *Kent's* Case; he was brought before the *Counts* and *Barons*, &c. for Treason: In the same year the Articles were read against *Mortimer*, and the King charged *Les Counts & Barons*, to give Judgment upon the said Articles. The same was in the Case of *Simon* de *Bereford*, *Matravers*, and others in that year: 11 *R.* 2. the Prelates departed from the House at the first Motion about the Appeals, and did not stay so much as till the Articles were read. In the Earl of *Northumberlands* Case, it appears, they had not so much as one Vote from the beginning to the end of the whole Proceedings, and the sole Management of the Case was by the Award and Judgment of the Lords Temporal. In the 21 of *R.* 2. the Prelates gave their Opinions generally, that Pardons were revocable, but after they had done, they departed the House, and would not consent so far to the Death of a man, as to give a particular Vote, when the Question was put, Whether the Pardons of the Duke of *Gloucester*, and the Earls of *Arundel* and *Warwick* were revocable? *Baker* 161.

And indeed if they should have been permitted to Vote about their Answers, &c. it would quite frustrate and elude the Design of the Prohibition; for somewhat or other might happen to be put to the Vote in their presence, concerning the Answer, Replication, &c. or concerning the Form and Method of Judicature, upon which the whole Business would depend; and by the Voices of the Spiritual Lords that Vote in,

might

might pass against the major part of the Temporal Lords, and so the whole Business lost, and the Expectation of Justice frustrated; so that it is highly reasonable, that if they be absent at all, they should be absent, *Dum de hujusmodi materiis agitur.*

Having thus by Reason and Authority established the Truth of those Propositions which I at first laid down, I shall now examine the Strength of those Arguments, whereby my Adversaries do support themselves, and maintain the Jurisdiction of the Lords Spiritual in Capital Cases.

And 1. Their Grand Objection is, That they never absented themselves when Capital Cases were Debated, upon any other account, then because they were prohibited by the Laws of the Holy Church, to consent to the Death of any man: And accordingly they made their Protestation, 11 *R.* 2. when they departed the House, *Juxta Sacrorum Canonum instituta non licet nobis interesse*, &c. And such a voluntary Departure for Conscience-sake (say they) lest they should concern themselves in the Effusion of Innocent Blood, could neither conclude themselves nor their Successors from claiming their Right to be present by the Fundamental Law of the Land, as Peers of Parliament. Here lies their Strength, and therefore a solid Refutation of this will remove all manner of Scruple, and discover the vanity of their pretensions to any Jurisdiction of this kind: Therefore in answer to this, I shall offer these following Considerations;

1. What-ever was the Reason that induced them to absent themselves when such Matters came to be Debated; yet it is manifest from what hath been said, that there was an Act of Parliament (to which they were obliged to give Obedience, as well as the Canons of the Church) that did expresly prohibit them to exercise Jurisdiction in those Cases: and although they did say that their Departure was in Obedience to the Canons of the Church, yet without doubt we ought to construe their Departure to be also in Obedience to the Laws of the Land: For the Case at the most favourable Representation, is no more than this; The same thing is both prohibited by the Law of God, and the Law of Man; those who forbear from the thing prohibited, do say they do it, because they are so commanded by the Law of God, and say no more: In this Case we cannot construe, that either the Law of Man doth lose its force and obligatory Power, or that those persons who said they forbore from the thing prohibited in Obedience to the Law of God, did either not obey, or disobey the Law of Man; I mean, *In foro humano.* If then the Prelates in former times did give Obedience to the Laws and Constitutions of this Nation in this particular; much more ought their Successors, whose Principle is strict Obedience to the Government of the Kingdom and perfect submission to the Higher Powers. The truth is, it was a happy thing that in the days of their Predecessors, the Law of the Church, and the Law of the Land did so well agree in this particular; and if you would consider the Humors and Principles of the Men, you would not wonder so much at their Non-acknowledgment of the Laws of the Nation, when they could secure themselves against the Compulsion of them and Punishment inflicted by them, without making any such acknowledgment. It is not strange that those men, whose Zeal for Religion was seen most in their Contentions and Wranglings with the Civil Power; and who thought that Obstinacy and Disobedience to Regal Authority, and the Laws and Constitution of the Government, where they thwarted the Ambition and Grandeur of the *Pope* and his Clergy, was the most certain way to merit Canonization; and that *Becket* and *Stratford*, and the rest of that Rebellious and Disobedient Tribe, were the mightiest Saints that ever lived upon Earth. It is not strange that those Men that would trample all Humane Laws under their Feet, if dissonant to the Canons of the Church, should pretend, that when the Canons of the Chuch did agree with the Laws of the Land, they yielded Obedience to the Canons of the Church, without taking notice of the Laws of the Land. And indeed it was an extraordinary *Specimen* of Candor and Modesty, that they did with so fair a pretence save themselves from the inconvenience of acknowledging the Temporal Power in the limitation of their Honour and Jurisdiction, which they were never known to be very forward to do: But God be thanked the times are turned, we have reason to expect

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more Humility and Loyalty from our now Spiritual Fathers, whose Principles do not allow them in the least Opposition to lawful Authority, and who it is to be hoped will never insist upon any thing, except they think that by the Law of the Land it is their Right.

Secondly, Although they pretended that their departure from the House during the Debates of Capital Matters, was in Obedience to the Canons of the Church; yet it is more than probable, that the consideration of the Law of *England* by which they were compellable to depart, whether there had been any such Canons in force, or not, was the strongest Reason why they did with-draw, and that for these two Reasons:

1. Because it is observable, That if those in whose power it was to dispense with their Disobedience to the Laws of the Land, did at any time give way to their Presence or Consent, that they should exercise Judicial Power in those Cases, then the Lords Spiritual used generally to make bold with the Canons of the Church, at least *ex vice*: How then can it be supposed, that at other times when there was no such Licence or Dispensation, their Departure was onely because of the Canons of the Church? That Record of 21 *R.*2. where they did consent to Constitute a Proxy, who should in their Name agree, or disagree to any Judgments of Death that should be given in that Parliament, is very considerable for this Point; for in that Case they gave Authority to another to do a thing which was unlawfull for them to do themselves, and it was done, because the King and Parliament being the Fountain of Law, and having power *unica vice*, or more, to dispense with any Law, at least such as come not within the Conusance of any other Court beside themselves, did give them leave so to do: whereas without doubt, the passing Sentence of Death upon a man by Proxy, was as great a Violation of the Canons of the Church, as if they had been personally present, and had passed Judgment themselves: For can any man rationally suppose, that the Clergy were so tender Conscienced, that they should not agree to the Effusion of any mans Blood themselves, and yet that their Consciences would allow them to Authorize another in their Name and Place, and by their Authority to consent to it? As if it were not the same thing in point of Conscience for me to kill a man, as it is to procure another to do it: And so in point of Law, that which I am prohibited to do my self, I am also prohibited to impower another to do; because that which a mans Servant, Procurator, or Attorney, doth by the Command, and by vertue of the Authority of the Master, is in Judgment of Law and Conscience interpretatively the Act of the Master himself: And the Constituting a Proxy in their Names to give judgment of Death by vertue of an Instrument under their Hands and Seals, will further appear to be a breach of the Canons, if you consider the Letter of the Canon made, *Anno* 1222. in the Reign of *H.*3. which you may find among the *Constitutiones Archiepiscopi* Stephani in *Linwood, f.* 146. ——*Authoritate quoque Concilii districtius inhibemus ne quis Clericus beneficiatus aut in Sacris Ordinibus constitutus litteras pro pœna sanguinis infligenda scribere vel dictare præsumant, vel ubi Judicium sanguinis tractatur, vel exerceatur interfit.* From this Canon I conclude, That Clergy-men ought neither to be present themselves, nor depute others *per litteras*, to be present *pro pœna sanguinis infligenda*. We have likewise a very pertinent Observation upon this Matter in an ancient MS. Chronicl. *in libro Mailrosse*, which hath written very largely of this Parliament that was held 21 *R.*2. wherein the Prelates are blamed for that Opinion which they gave generally about the Revocation of Pardons, because the consequence thereof was the Death of those whose Pardons were Revoked: *Dederunt ergo locum* (saith the Book) *Prælati judicio sanguinis in hoc facto. Ita quod dubitatur a pluribus si non incurrerent irregularitatem pro negotio memorato, unde contigit quod propter istud minus peccatum inciderent in aliud Majus peccatum consequenter, ut hujusmodi personam constituerunt Procuratorem pro eisdem, qui illorum vice consentiret ad judicium sanguinis dandum in dicto Parliamento si necesse foret, & occasio emersisset*, &c. So that upon the whole Matter, it is irrational to think that their departure from the House ever before this, was meerly in respect of the Canons, when we see that the first offer of the King and

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Parlia ment to admit them to the exerciſe of Juriſdiction for that time, was by them kindly accepted with a *Non obſtante* to the Canons of the Church. It is true, the giving Judgment of Death by Proxy, was as great a violation of the Laws of *England*, as of the Canons of the Church: yet inaſmuch as *Conſenſus tollit errorem*, it was for that time well enough.

This is further illuſtrated, If you obſerve that in thoſe Caſes to which the Prohibition of the Law did not extend, they made no ſcruple of Sitting and Voting, although their Voting in thoſe Caſes was againſt the Canons of the Church. This may be inſtanced in the Caſes of Bills of Attainder: for although the Canons do prohibit them from Voting in ſuch Caſes, as much as any Caſe whatſoever; inaſmuch as in paſſing the Bill, they Vote, That the Perſon is Guilty, and ſhall ſtand actually Attainted of High Treaſon, and ſhall be deemed and adjudged a Traytor, and ſhall ſuffer as in Caſes of High Treaſon, *&c.* yet they do generally Vote, becauſe that the Prohibition of the Law doth not extend to Voting in Bills of Attainder, ſeeing that is not *Agitare judicium*, but onely *Legis lationem*, what they do in that Caſe is not Judicially, but onely the exerciſe of their Legiſlative Power; otherwiſe the Houſe of Commons would make themſelves Judges, and would challenge a Judicial Power in the Tryal of any Lord, ſeeing in paſſing Bills of Attainder they do every whit as much as the Biſhops; for they Vote that he is Guilty, *&c.* and that he ſhall be adjudged a Traytor, *&c.* And the Act of Parliament runs, *Be it Enacted by the King, the Lords Spiritual and Temporal, and Commons in Parliament aſſembled.* For theſe two Reaſons I think it very improbable, that the Canons was the onely cauſe why the Prelates did depart the Houſe when Capital Caſes were Debated: But that the weakneſs of their Objection may further appear; I anſwer,

Thirdly, Although we ſhould admit that the Canons of the Church were the firſt occaſion of the beginning of this Cuſtom among us, and that thoſe Hiſtories and Chronicles which inform us after this manner, do ſay true, yet this is no Argument againſt the validity of a ſtanding Cuſtom, the Commencemant of which is not upon Record: for Hiſtories and Chronicles are not Matters of Record, neither are they in Law ſuch ſtrong and undeniable proof of the beginning of any uſage, as to make it no Cuſtom; neither are the Canons of the Church Matters of Record; and therefore cannot prove that there was no ſuch Cuſtom before the making of thoſe Canons. Seeing then it is without doubt that there was a Cuſtom that the Prelates ſhould not exerciſe Juriſdiction in Capital Caſes, and there is no Record that doth mention the time when it did begin, nor any time when it could be ſaid, There never was ſuch an Uſage; it muſt of neceſſity be ſuppoſed that it is as ancient as the Government it ſelf, and part of the Fundamental Contract of the Nation, whereby their Juriſdiction was originally limited that it ſhould not extend to ſuch and ſuch Caſes. So that I do not argue from the validity or invalidity of thoſe Canons, nor from any Conſtruction that may be made upon the Letter of the Canons, but inſiſt upon it as part of the Common Law of *England*, and do abſolutely deny that it had its Original and Force from any Authority that the Pope of *Rome* with or without his Council, or a Convocation of the Clergy in *England* had, to impoſe Laws upon us; but affirm, that its force and obligatory Power did ſolely ariſe from the voluntary reception, approbation, and uſage allowed by the People of *England*, which being by them tranſmitted to Poſterity, is a thing reputed to have been uſed and practiſed time out of mind, and is thereupon ranked among the Common Laws of this Kingdom; which are no more but general Uſages or Cuſtoms of general Concernment to the whole Nation in things of Temporal Coniſance, firſt upon reaſonable Conſiderations by conſent allowed, and then tranſmitted as a Tradition to Poſterity, by whom they are ſuppoſed to have been in ure ever ſince it was a Nation: But this matter of Judicature in Capital Caſes is a point of Temporal Juriſdiction in a Temporal Court; *viz.* The High Court of Parliament, and therefore of Temporal Coniſance: the departure of the Clergy when ſuch Caſes came to be Debated, hath alſo been an interrupted practice for many Ages together; yea and moſt ſtrictly obſerved in the firſt Ages, whoſe Tranſactions are Recorded (as hath been already proved) and it is impoſſible by Re-

cord to trace it to its first Original: Therefore it agreeing with every part of the definition of Common Law, is part of the Common Law it self, and doth consequently bind all subjects to its Observation as a standing Law, not alterable any way, but the same way it at first took its force, that is, by general consent, according to the *Maxime* laid down by my Lord *Cook*, in his 1. *Inst.* 115. *b. Whatsoever was at the Common Law, and is not ousted or taken away by any Statute, remaineth still.*

And although this Practice that was enjoyned by these Canons, was here allowed and observed, yet that observation was not out of respect to the Canons as such; but as they did command such things as were judged rational: and it had been the same case if the Custom had begun in *England* in imitation of other Countries, as it is upon the account of the Canons: For though the Bishops of *Rome* claiming an universal and absolute Power of Legislation, *in ordine ad Spiritualia*, over all Christendom, took advantage of every Opportunity that offered it self for the obtaining of this Right, which they pretended was *Jure divino*, and in Right of their Vicarship due; yet knowing that Princes would not so easily part with the Jewels of their Crowns, in suffering their People to be in Subjection to the Laws and Constitutions of any foreign Prince, in things which either directly or indirectly did affect their Temporal Possessions, they thought it necessary to manage their Business with all imaginable artifice and cunning, by bringing the Laity to the humour by degrees; and accordingly did at first collect certain Rules and Directions for the Government of the Clergy onely, which were called *Decreta*, first published in *England* during King *Stephens* Reign (as some do think, though others reckon it was long before) but never throughly observed in *England*, *Kellaway*. 7 *H.* 8. 184. But having got a small incouragement by the reception of these Rules in many Countries, they thought they might venture a little further, and then would have the Laity as well as the Clergy, to give Obedience to their Edicts: but that must be first in some inconsiderable indifferent things; as Abstinence from Meats, *&c.* and did not style them with the Lordly Name of *Leges*, but with a great deal of Meekness and Humility, and the Complement of *Servus servorum Dei*, did offer to their Consideration certain *Rogationes*; whence the Abstinence-week before *Whitesunday* was called *Rogation-week*, as *Marsilius Pat. lib. Defensor. pacis*, 2 *part.* 23. observes; Christians having out of Piety and Honour for his Holiness, yielded Obedience to these same *Rogations*, they made bold to proceed one step further; that is, They together with their Councils made certain *Orders* or *Decretals* about Temporal Matters, (but *in ordine ad Spiritualia* too) when these came first into *England*: See *Matthew Paris*, 403. To these *Decretals* Obedience was required from Prince and People, and all Contumacious and Obstinate Delinquents were most severely Anathematized: The *Decretals* were such as these, That any Clergy-man that was grieved by a Judgment or Sentence in the *Court-Christian*, or any other Court Ecclesiastical within this Realm, might be relieved by an Appeal from *Rome*; That no Lay-man should have the Disposition of any Ecclesiastical Preferment, nor the Presentation to a Church; That he shall not Marry within such and such Degrees; That Children born before Espousals, be legitimate; That the Clergy should be absolutely exempted from Secular Power, *&c.* Yet these *Decretals* met with very little respect in *England*, *France*, or any other part of *Christendom*, except *Peter's* Patrimony in *Demesne*, the *Popes* own Territories, called by the Canonists *Patria Obedientiæ*. For in *England* (to wave any discourse of the Laws and Customs of other Countries) in stead of being received and observed according to Expectation, they were stoutly opposed by the Judges and Magistrates, as derogating from the Soveraignty and Prerogative of the King, and tending to the detriment of the Rights and Properties of his Subjects: And in Confirmation of this, several Acts of Parliament were made to curb the Insolence of those usurping *Popes*, and to punish the audacious Enterprises of those factious and disloyal Subjects, who did presume to attempt to controll the Judgments that were given in the Kings Courts by Process from the *Pope*; or to procure Provisions and Reservations of Benefices by *Bulls* or *Breve's* from *Rome*: See 27 *E.* 3. *c.* 1. 48 *E.* 3. *c.* 1. 25 *E.* 3. *c.* 22. 16 *R.* 2. *c.* 5. whereby such Suers of Appeals, and Procurers of Bulls

and

and Proceſs from *Rome*, for the purpoſes aforeſaid, are made liable to the Penalties of a *Præmunire*, whereby the Body of the Offendor is to be Impriſoned during the Kings Pleaſure, his Goods forfeited. and his Lands ſeiſed into the Kings Hands, ſo long as the Offendor liveth. How far the Benefit of Clergy was allowed, I have already ſhewn; And as for the Matter of Legitimation, you may ſee the Statute of *Merton*, c. 9. *Et rogaverunt omnes Epiſcopi Magnates ut conſentirent, quod nati ante matrimonium eſſent legitimi, ſicut illi qui nati ſunt poſt matrimonium quantum ad ſucceſſionem hæreditariam, quia Eccleſia tales habet pro legitimis. Et omnes Comites & Barones reſponderunt quod nolunt* Angliæ *leges mutare, quæ hucuſque uſitatæ & approbatæ ſunt:* Vide 18 E. 4. 30. *a.* All which Statutes are Declarative of the Common Law, and therefore do prove that the People of *England* were never obliged to allow of any Decrees of Councils or Canons of the Church, further than they judged it fit and convenient ſo to do; which Arbitrary Reception, together with a Tranſmiſſion to Poſterity, did of it ſelf make it one of the Laws of *England*, which continues in force (though the Councils or Convocations ſhould afterward repeal their Decrees) till they be altered by Act of Parliament, *Co.* 5. *Cawdries Caſe* 9. *Davies Reports* 70, 71: *the caſe of Commendam:* And the Preamble to the Statute of Diſpenſations and Faculties, made 25 *Hen.* 8. *c.* 21. which runs in this manner: *Whereas this his Majeſties Realm, recogniſing no Superiour under God, but onely his Majeſty, hath been and is free from ſubjection to any mans Laws, but onely ſuch as have been deviſed, made, and ordained within this Realm, for the wealth of the ſame, or to ſuch other as by ſufferance of the King and his Progenitors, the People of this Realm have taken at their free liberty by their own conſent to be uſed among them, and have bound themſelves by long Uſe and Cuſtom to the obſervance of the ſame, not as to the obſervance of the Laws of any foreign Prince, Potentate, or Prelate, but as to the cuſtomed and ancient Laws of this Realm, originally eſtabliſhed as Laws of the ſame, by the ſaid Sufferance, Conſents and Cuſtoms, and none otherwiſe.* And ſo it is in *Co. Rep.* 5. 2. *part. fol.* 31. *All Canons, Conſtitutions, Ordinances, Synods, Provincials,* &c. *are in force that have been by general Conſent and Cuſtom within the Realm allowed, and ſo may by general conſent be corrected, enlarged, explained or abrogated.* Seeing therefore it is evident from what hath been already ſaid, that thoſe Canons and Conſtitutions of the Church concerning Judicature in Matters of Blood, have not onely been practiſed and allowed in this Nation ſucceſſively for ſeveral Ages together, beyond all time of Memory, but alſo ratified and confirmed by Act of Parliament; it follows, that they have the force of Laws of *England*, and are not alterable without an Act of Parliament; as the twelve Tables of *Athens* did really become, and were properly called *Jus civile Romanum*, after they were voluntarily received and allowed at *Rome:* And as the ſame may be inſtanced in ſome parallel Caſes among our ſelves, as the Priviledge of Clergy, Pluralities, and Diſpenſations, *&c.* which were parts of the Common Law of *England*, although they became ſuch no otherwiſe then by the Nations reception and obſervation of the Canons of the Church.

Laſtly, I am not apt to believe that this Cuſtom was taken up upon the account of the Canons of the Church, but rather becauſe it was a thing agreeable to the Conſtitution of the Government, the Reaſon and Rules of the Common Law, and the Nature of their Juriſdiction and Honour, being meerly prædial or feudal; and that becauſe upon a ſtrict ſearch it will be found of ancienter date than any of the Canons of the Church; for the firſt Canon that I find in *Linwood* is that which was made *An.* 1222. and is among the reſt of the Conſtitutions of Archbiſhop *Stephen* in theſe words; *Preſenti decreto ſtatuimus ne Clerici beneficiati aut in Sacris Ordinibus conſtituti villarum Procuratores admittantur, videlicet ut ſint Seneſchalli, aut Ballivi talium adminiſtrationum, occaſione quarum laicis in reddendis rationibus obligentur, nec Juriſdictiones exerceant ſeculares præſertim illas quibus* Judicium Sanguinis *eſt annexum Autoritate quoque Concilii diſtrictius inhibemus ne quis Clericus beneficiatus vel in Sacris Ordinibus conſtitutus litteras pro pœna* Sanguinis *inſligenda ſcribere vel dictare preſumat, vel ubi* Judicium Sanguinis *exercetur interſit: Lin-*

wood,

wood, 146. Which Conſtitution was made above fifty years after the Parliament at *Clarendon*, which confirms this Cuſtom, and calls it one of the *Avitæ conſuetudines*. Theſe Particulars well conſidered, will give a very ſatisfactory Anſwer to their Objection, and therefore I need not ſay any more.

But it is further objected, That the Clergy in their Proteſtation which they made 11 *R.* 2. do declare, *Quod ipſos perſonaliter intereſſe pertinet*, (and ſo they did in ſome Proteſtations which were made afterward) and after all they do inſert this Clauſe, *Non volumus nec intendimus quod proceſſus habiti & habendi*, &c. *futuris temporibus quomodolibet impugnentur, infirmentur, ſeu renoventur*. From this they argue, otherwiſe all the Proceedings of the Houſe of Lords in the abſence of the Clergy, are invalid and reverſable, or elſe to what purpoſe is this Clauſe: And the Lords Temporal giving leave that this Proteſtation ſhould be entred upon Record, did implicitely aſſent to what the Clergy alledged therein.

To this I anſwer, That a Proteſtation in its ſelf is no argument of any Right neither doth the permiſſion and allowance of any Proteſtation, yield that right which the Proteſter is deſirous to ſave, but only ſaves the right which the party had before, if he had any; and if none, then the making that *Salvo* could give him none; for the outmoſt that a Proteſtation can do, is to anticipate a Concluſion, or Eſtoppel; *i. e.* to provide that the doing of any ſuch Act as is Contained in the Proteſtation, ſhall not be conſtructed to the Prejudice of the Party; ſo as to Barr or Conclude him from Claymming afterward that which *in rei veritate* is his right. So that this Proteſtation of the Clergy is no Argument of their Right to be preſent and to Vote in Capital Matters; and that chiefly for theſe two Reaſons: 1. By the Roll we find that the Clergy did not only depart when Capital Caſes were to be debated, but alſo in all other Caſes that were done that Seſſion; becauſe there were many Matters of Treaſon to be handled, therefore they abſented from the Parliament altogether: ſo it is in Sir. *Rob. Cotton's Abr.* 322. So that this Proteſtation may very well be ſuppoſed to have been made with reſpect to thoſe other Matters which were not Capital, where they had an undoubted Right to be preſent, and therefore ſuch a Proteſtation might be very Proper; and not to have any reſpect to thoſe Caſes which were Capital, eſpecially ſeeing they did alwaies in ſuch Caſes Abſent themſelves in former times without making any Proteſtation. 2. Admitting that the Clergy did intend that Capital Caſes as well as others which were not Capital, ſhould be within the *Salvo* of their Proteſtation; yet nothing can be inferred from thence, but that they themſelves ſaid they had Right to be preſent, and what then? Muſt it of neceſſity follow that they had Right becauſe they Claimed it? If that Conſequence had been allowed to be good, I am afraid the Crown of *England* had been Incorporated long ago into the Triple Crown.

As for that Clauſe of the Proteſtation for the Validity of all ſuch Tranſactions as ſhould happen to paſs in their Abſence, I muſt confeſs I do not think it was to very much purpoſe. 1. Becauſe that without any *Proviſo* the Proceedings of the Houſe of Lords in their Abſence, had certainly been valid enough, as I ſhall prove anon. 2. If they had not been good, this Clauſe could not have helped them; becauſe wherever the Aſſent and agreement of any perſon or perſons is Requiſite for the perfection of a thing, it is neceſſary that that thing to which the Aſſent is Requiſite, be *in eſſe* at the time of the Aſſent made; for otherwiſe it is an Aſſent to nothing, and that is as much as no Aſſent at all: If therefore the Aſſent of the Prelates be indiſpenſably neceſſary to the perfection of every Judgment and Bill that paſſeth the Houſe of Lords; Such a precedent Aſſent to all that ſhall Paſs, during their Abſence in General, which is an Aſſent to they do not know what themſelves, will not amount to a ſufficient agreement; The Reaſon is, becauſe the Law of *England* doth preſume that in all private Tranſactions between Party and Party, and much more in things of Publick concernment and of ſo great moment, as Making of Laws and Giving Judgment of Death uppon Peers of the Realm, whatſoever a Man doth is upon Rational Inducements, and that the Conveniency and Advantage which he expects

pects will Accrue thereby, is the Motive that prevails with him to agree to the thing; and therefore all such Agreements as are made at a venture, when the party agreeing knows not what it is he agrees to, (as when a man agrees to a thing before it be in *esse*) are rejected in Law as Irrational and Inconsiderate. So if a Tenant comes and say to his Lord, *I agree to all Grants which you shall hereafter make of the Manor, or any part of it*; Surely this without a Subsequent Agreement to every particular Grant, will not amount to an Attornement. And at the Common Law, Licences for Alienation, granted to Tenants, were always special; and a general Licence to all Alienations which the Tenant should afterward make, was void. And if such an Agreement of the Lords Spiritual, as is before described, be sufficient to perfect any Judgment or Bill which shall pass the House of Lords, then they may as well say that the whole House of Lords may depart from Parliament, and agree beforehand in the same manner to every Bill which shall pass the House of Commons, and these with the Royal Assent shall be good Laws; especially if it be, as they say, that the Clergy is one of the Three Estates of *Parliament*.

But then you will demand, Why should the House of Lords suffer these things to be entred upon the Roll, if they did not think that their Claims were legal? &c. To this it may be answered, That the Roll is only a Register or Narrative of all the Matters of Fact that passed in the House of Lords, and although the entring of a Passage upon the Roll makes it so Authentick, that the Matter of Fact (*viz.* that there was certainly such a passage) is undeniable; yet it doth not follow that every thing that is entred upon the Roll, is good Authority for Matter of Law, except it appear by the Roll that it was taken for Law by the Vote and Resolution of the House; and therefore although the House of Lords did suffer this Protestation to be entred upon the Roll, yet it doth not follow that they did allow that every thing that the Protestors said was true, but only allowed it to be true, that the Protestors did say so. And besides, the Entring of a Protestation is a thing which is always reckoned the best Expedient for reconciling of Differences when begun, or preventing of them before they are begun; or at least for diverting them till a more seasonable time, when the putting of the Matter to a Tryal would either prove dangerous, or expensive of more time, than the urgency of other more important Affairs, then to be managed would allow; and therefore the Request of Entring their Protestation, is never upon any account whatsoever, denied to those who have not a mind to be concluded by the then Proceedings; and if there be any thing contained in the Protestation that is of an ill Complexion in the Judgment of the House, either as tending to the Diminution of the Kings Prerogative, the Authority of Parliament, or otherwise Vitiating the Constitution of the Government; the Protestation is allowed to be Entred first, and the Protestors punished for it when they have done. We find in the Reign of *Rich.* 2. two Bills passed the House of Commons, the one against *Provisors*, the other against *Procurers* of Process from the Court of *Rome*; these Bills were violently opposed by the Clergy in the House of Lords, but notwithstanding the Bills passed the House, the Clergy in a great Rage depart the House, and Protest against the Bills, as abridging the Authority and Priviledges of the Holy Church; which the Lords suffered to be entred, and yet did not agree to those Allegations of the Clergy; for the Royal Assent was given, and they were always accounted good and *Iust* Laws, 13 *R.* 2. *c.* 2. and *c.* 3. We find also that in the time of his late Majesty, Twelve Bishops departed the House, and Protested against all Orders, Laws, Votes, &c. that should be made in their Absence, which Protestation at their Request was entred upon the Journal, and yet it was so far against the Sense of the House, that they Voted it prejudicial to the Government, and destructive of the very Being of Parliaments; for which some of them were put into the Tower. This I mention, to shew that although the Matter of Protestation do as much thwart the Genius and Disposition of the whole House, yet the Request of having it entred, is never denied.

In the next place, I shall consider the Roll of 21 *Rich.* 2. where the first Petition that the Commons made that Parliament to the King, was; *For that divers Judgments were heretofore undone, for that the Clergy were not present, the Commons prayed the King, that the Clergy would appoint some to be their Common Proctor, with sufficient Authority thereunto.——The Prelates therefore being severally examined, appointed Sir* Thomas de la Percie *their Proctor to Assent, as by their Instrument appeareth.* Thus was the Practise of Constituting Proxies begun.

It is apparent to all men of Common Sense, That if the Clergy were forbidden to give Judgment of Death by any Law or Rules whatsoever, that Law was violated by their Constituting a Proxy, as much as if they had been personally present; Whether or no their Personal Presence was prohibited by the Law of *England* at this time, I leave to the Judicious Reader to determine from what hath been said before: If they were prohibited, then certainly this Petition of the Commons was unwarrantable, and contrary to Law. It is not impossible that the House of Commons being but fallible, men sparred on by too precipitant a Zeal and Eagerness for the accomplishment of a Business, should by endeavouring to make sure work, fall inconsiderately into another extream, and through the want of due Examination of Precedents, become guilty of a mistake. I shall not trouble my self much in discoursing about the possibility of the thing, for I shall make appear, that it was actually so in our Case: For, 1. That which was the ground of the Petition of the Commons; *viz. That divers Judgments have been heretofore undone*, &c. was a palpable mistake *de facto*: It is true, the two Judgments that were given against the two *Spencers*, 15 *Ed.* 2. were reversed for this cause, through the great favour and interest that they then had at Court: And there is no question, but these two Judgments were the ground of this Commons Petition made. 21 *Ric.* 2. for there are no other Judgements to be found that were ever reversed for this cause; but how well their Petition was grounded you may learn from 1 *Ed.* 3. r. 1. Where this same Judgment is declared in Parliament to be good, and that the aforesaid reversal was null and void; and the two *Spencers* upon this Affirmance of the Judgment were Executed. I suppose if the forwardness and Zeal of the Commons had given them time to search the Records with so much diligence that they might have found this, they had not said; *For that divers Judgments have been heretofore undone*, &c. 2. That in point of Law the absence of the Prelates makes not a Judgment erronious, besides the Authority of that Record, 1 *Ed.* 3. is further proved: 1. From the Earl of *Salisbury*'s Case, 2 *H.* 5. who petitioned that the Judgment that was given against his Father might be Reversed, and Assigns for Errour, that it was not with the Assent of the Lords Spiritual, who are Peers of the Realm: the House of Lords upon Debate resolved, that it was not Errour, and therefore the Judgment was good. 2ly, If the Consent of the Clergy be absolutely necessary to every Judgment that passeth the House of Lords, then consequently it must be necessary to every Act of Parliament; There can no manner of Difference be Assigned between the two Cases as to this Matter, for their Power and Jurisdiction in Legislation, is every whit as ample as their Power of Judicature; and therefore their Concurrence is equally necessary in both Cases. But it is a thing of dangerous Consequence to Assert, that an Act of Parliament cannot be made without the Consent of the Clergy, for it will make some of the best Laws that ever were made in *England* before the Reformation, and which have ever been to this day accounted firm and established Laws, of no force at all. Most of the Statutes of *Mortmain* were made against the will of the Clergy, and their Dissent is recorded. The Statute *De Apportatu Religiosorum*, is Enacted by the King, *De Consilio, Consensu, Baronum, Magnatum, Procerum, & Regni sui Comunitatum in Parliamento*, &c. and yet proved by my Lord *Cook* in his Exposition of this Statute to be a good Law, from the Testimony of many Records and Acts of Parliament that recite this Statute. The Statute of 3 *Rich.* 2. *c.* 3. was made against the Clergy, for the ill disposition of Dignities, Offices, Canonries, Prebends, and Parsonages, and other Ecclesiastical Preferments, upon lewd and licen-

cious persons, to the Scandal of Religion, and the neglect of Divine Service, &c. The Clergy being somewhat displeased that any should undertake to reform them, at the first reading of the Bill departed, but notwithstanding the Bill past, and is said to be Enacted by the King, Nobles of the Land, and the Commons, leaving out the Clergy: And yet this hath been allowed for an established Law by all the Judges. See Roll 3 *R.* 2. *n.* 38. —40. The Statute of 7 *R.* 2. *c.* 12. was made to impower Justices of Peace to enquire of several grievous Extortions committed by the Bishops and their Officers, to the great grievance and oppression of the Kings Liege People, &c. The bringing in of this Bill offended the Clergy more than the former, insomuch that they left the House in a great Huff, Protesting against the Bill as injurious to the Franchises and Jurisdiction of the Church, yet notwithstanding it passed into a Law.

The Clergy were absent all the Parliament that was held 11 *R.* 2. and yet divers good and profitable Laws were made that Parliament never questioned for their Validity, but always put in use, as 11 *R.* 2. *c.* 7. about Merchants, *c.* 8. concerning the granting of Annulties, *c.* 9. concerning new Impositions, *c.* 11. of Assizes; and several others made in the absence of the Clergy. I might for this enumerate all the Statutes of *Provisors* and the Statutes of *Premunire*, for Suers of Appeals, and other Process from *Rome*, as 25 *E.* 3. *c.* 1. and 22. where the Names of the Clergy are left out: and 13 *Rich.* 2. *c.* 2. and *c.* 3. where they were so far from Assenting, that they entred Protestations against them, because they abridged the Popes Authority, as is before observed: And the 16 *R.* 2. *c.* 5. passed against the will of the whole Clergy. And so the Statute that was made in the same year about the Queens Marriage, without the Kings Consent, was made without the Concurrence of the Clergy; for their Assent to it was special in this manner: *So far as it is agreeable to the Law of God and the Holy Church.* Which being conditional and under a Restraint, was according to the Course of Parliaments accounted as no Assent at all, and so it was specially Entred; and yet none did ever question the Strength and Force of this Act.

These Statutes being allowed by the Judges of *England* as Good and Authentick Laws, although they were not agreed to by the Lords Spiritual, do prove that the Concurrence of the Lords Spiritual is no more necessary to the Essence and Perfection of an Act of Parliament, than the Concurrence of as many Temporal Lords.

Upon the whole Matter, it appears to have been a very strange and unaccountable over-sight in the House of Commons at that time, that they should be the first Introducers of an Innovation upon so false a Ground as theirs was. But however this Practice being built upon so sandy a Foundation, it seems had no long continuance; for there doth not occur in any Author, nor in the Abridgments of the Records, any mention of more than Two Proxies; the first was Sir *Thomas* de la *Percie*, the second was Sir *William* de la *Scroope*, who immediately succeeded him in this his New Office: But seeing it is rash to Assert a Negative in a Matter of Fact, it will be very satisfactory if any will inform us of any more, and that may easily be done, if there were any; because none can act as a Proxy, except his Procuratorship be Entred upon the Roll.

Most of those Records that are Cited in the behalf of the Spiritual Lords, are either such as were in those times when the Clergy put in Proxies, as all those that are upon or after the 21 *Rich.* 2. and about the beginning of *Hen.* 4. Such is the Case of the Earl of *Arundel*; for it appears by the Record, that the Constitution of the Proxy was in *N.* 9. and the Arraignment of the Earl was not till *N.* 15, or 16. and therefore after the Proxy; so that there was reason that the Records should be Entred *by the King, Bishops, and Lords*, seeing the Bishops Deputy was present; but it is no Argument of their personal presence: Or else they are Cases of Bills of Attainder, and that is not much to our purpose; for those will as well prove that the House of Commons have sate Judicially upon Matters of Life and Death. A Bill

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of Attainder is reckoned the ſtrongeſt way, becauſe there is a Concurrence of all the Three Eſtates, of both the Judicial and Legiſlative Power; and that is neceſſary for making a Forfeiture of all manner of Rights, Titles, and Intereſts, which otherwiſe are not Forfeitable: And if at any time there was an opportunity for the Clergy to tranſgreſs the Laws both Eccleſiaſtical and Civil (I mean the Statutes and Cuſtoms of this Realm) which was connived at by the reſt of the Lords and Commons, I hope that will not be accounted a Precedent to overthrow a Cuſtom of ſo Ancient a Date, and ſo agreeable to the Fundamental Conſtitution of the Government, and the Grounds and Reaſons of the Common Law, and alſo Confirmed by an Act of Parliament: So by degrees the whole Method and Courſe of Parliamentary Proceedings may be altered, and the very Being and Foundation of Parliaments ſhaken. So we ſhould have had the Lords refuſal to Sequeſter the Earl of *Danby* from Parliament, a Precedent; if they had not afterward acknowledged it to have been an Errour. We may find in many Caſes the Lords Diſpenſing with *Magna Charta*: 4 *E.* 3. *n.* 6. They paſſed Judgment of Death upon ſeveral Commoners: 15 *E.* 3. We find ſeveral Particulars enumerated, wherein the Commons complained of Breaches of *Magna Charta*, and we are not ſure that all theſe particular Caſes were remedied, and therefore muſt theſe ſtand all for Precedents? At this Rate there are few Points of Law perhaps that will eſcape Doubt and Controverſie: for we ſhall have ſome of the Lords pretend they can tranſfer their Honours, and ſo are able to make the Kings Enemies his Councellors, becauſe in *Dancourt's* Caſe, 4. *Inſt.* 126. one Branch of the Family ſate in the Houſe by vertue of a Grant from the other Branch of the Family, from the Raign of *E.* 2. to *H.* 6. And the Earldom of *Cheſter* was firſt granted 17 *H.* 3. and transferred 39 *H.* 3. And upon theſe Precedents there was an Attempt in the Lord *Fitz-Walter's* Caſe to make a Baron by Tranſlation of intereſt. Admitting therefore that Once or Twice, or ſuch a matter, the Biſhops have Voted in Capital Caſes, yet they cannot Controul an Antient and well eſtabliſhed Cuſtom, though I am not apt to believe there are many ſuch Caſes: However it was a very pleaſant humour of a Gentleman that wrote lately of this matter and cited a Precedent in the Raign of *R.* 2. Of the Earl of *Arundel* and *Wardor*, whereas there was no ſuch Lord as *Arundel* and *Wardor* Created till King *James* his time, *Vide pa. ult.* ſo *p.* 30. He cites the Caſe of the Earl of *Saliſbury*, who in his Petition ſays the Prelates are Peers in Parliament, and aſſigns for Error that they were Abſent when Judgment was given againſt his Father; and this is a good Precedent to prove the Prelates right to Vote in Capital Caſes as Peers in Parliament: Whereas the Petition was diſallowed, and the Judgment affirmed by the reſolution of the whole Houſe. Such a way of arguing deſerves ſome ſpecial animadverſion. But I ſhall ſuperſede any further Conſideration of the matter, and ſhall conclude that without an Act of Parliament the Biſhops can have no right to Vote in Capital Caſes, which if this preſent Parliament ſhall think fit to make, it behoves all true Subjects to agree thereto.

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